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No. 621

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America, having its principal place of business in the City of Coral Gables, Florida, and PAN AMERICAN BANK OF MIAMI, a banking institution organized and existing under the laws of the State of Florida, having its principal place of business in the City of Miami, Dade County, Florida, and a member of the Federal Reserve System of the United States,

Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation having its principal place of business in the City of Coral Gables, Dade County, Florida, and JOHN NICHOLAS, as Trustee under Chapter X, Federal Bankruptcy Reorganization Proceedings now pending in the United States District Court, Southern District of Florida, CITY OF WEST PALM BEACH, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation authorized to do business in the State of Florida, TOM MAXEY, RUSSELL A. ORTMAYER, RICHARD R. REYNOLDS, JIM M. LANCASTER, JR., EARL L. GOODWIN, ISLAND CONSTRUCTION COMPANY, a corporation organized under the laws of Puerto Rico and having its principal place of business in Dade County, Florida, H. S. FLAGG and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

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THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America, having its principal place of business in the City of Coral Gables, Florida, and PAN AMERICAN BANK OF MIAMI, a banking institution organized and existing under the laws of the State of Florida, having its principal place of business in the City of Miami, Dade County, Florida, and a member of the Federal Reserve System of the United States,

Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation having its principal place of business in the City of Coral Gables, Dade County, Florida, and JOHN NICHOLAS, as Trustee under Chapter X, Federal Bankruptcy Reorganization Proceedings now pending in the United States District Court, Southern District of Florida, CITY OF WEST PALM BEACH, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation authorized to do business in the State of Florida, TOM MAXEY, RUSSELL A. ORTMAYER, RICHARD R. REYNOLDS, JIM M. LANCASTER, JR., EARL L. GOODWIN, ISLAND CONSTRUCTION COMPANY, a corporation organized under the laws of Puerto Rico and having its principal place of business in Dade County, Florida, H. S. FLAGG and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

A. THE OPINIONS BELOW.

In the October Term, 1960, of this Court a Petition for Writ of Certiorari was directed by the same petitioners against the same respondents. The Petition and the accompanying record were numbered No. 559, October Term, 1960.

The record submitted in that case, and as shown in the index, began with the complaint for the foreclosure of three mortgages, filed September 20, 1957, in the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, in chancery, No. 205613-E. Plaintiff was The Coral Gables First National Bank, a national banking institution, and the Pan American Bank of Miami, a State banking institution under the laws of Florida, and a member of the Federal Reserve System was joined as a party plaintiff because that State Bank held certain participation certificates involved in the three mortgage loan held by the National Bank. The claim of the State Bank was based upon its participation in the assets which were mortgaged as security for the original loans with the National Bank.

This proceeding resulted in a decree by the Circuit Court of Dade County, Florida, the first decree being dated June 26, 1958 and designated "Partial Final Decree of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida". A second order amending the Partial Final Decree of June 26, 1958, was entered on July 2, 1958.

The opinion of the District Court of Appeal of Florida, Third District, was rendered on March 22, 1960. Petition for rehearing was denied on May 4, 1960 (See 119 So.2d 741).

A petition was then filed by both The Coral Gables First National Bank and the Pan American Bank of Miami to the Supreme Court of Florida on May 18, 1960, which opinion operated as a supersedeas and stayed all proceedings in the lower court, as will show by order of the Supreme Court of Florida of May 24, 1960.

The Supreme Court of Florida denied the petition for certiorari without an opinion, and denied a petition for rehearing, final order being dated September 19, 1960. Under the rulings of the Supreme Court of Florida, this denial was not on the merits, and left the opinion and decision of the District Court of Appeal of Florida, Third District, originally dated March 22, 1960, as the final opinion of the highest court of Florida then having jurisdiction of the subject matter and the parties.

Petitioners herein filed their petition for writ of certiorari in this Court on or about December 2, 1960, in which petitioners submitted a record beginning with the filing of the complaint of September 20, 1957 through May 4, 1960. Attached to the appendix to the petition for certiorari in case No. 559, October Term, 1960, were copies of the order denying the petition for certiorari by the Supreme Court of Florida on September 19, 1960. Briefs for the respondents were filed in this Court in January, 1961, and petitioners' reply brief was filed on February 10, 1961. This Court entered its order denying the petition for certiorari on February 20, 1961.

After this Court denied the petition for certiorari to the District Court of Appeal of Florida, Third District, on the date above set forth, the cause was set for hearing again in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, which resulted in the entry of a new decree by the said Circuit Court dated

April 14, 1961 (Tr. supporting this Petition for Certiorari, p. 175).

An interlocutory appeal was entered from this judgment or decree of April 14, 1961, to the District Court of Appeal of Florida, Third District, and on May 25, 1961, that Court entered an order granting the motion of appellees to quash the interlocutory appeal from the final order of the Circuit Court of the Eleventh Judicial Circuit of Dade County, Florida, dated April 14, 1961.

A petition for certiorari was filed in the Supreme Court of Florida within 15 days from the order of the District Court of Appeal of Florida quashing the appeal, and the Supreme Court of Florida entered its order denying the said petition. The order was announced on July 24, 1961. Filing of the same was delayed pending the disposition of the petition for rehearing filed by the petitioners, and both orders were then certified by the Clerk of the Supreme Court to the District Court of Appeal of Florida, Third District, on the 26th day of September, 1961, and lodged in the Clerk's Office of the District Court of Appeal of Florida at Miami, Florida, on September 27, 1961.

We are attaching as an appendix to this petition for certiorari:

Original "Partial Final Decree" of June 26, 1958, of the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, and Order of July 2, 1958, amending said Decree (Appendix A1-A19).

Opinion of District Court of Appeal of Florida, Third District, dated March 22, 1960 (Appendix A19-A34).

Mandate of District Court of Appeal of Florida, Third District, based upon that opinion (Appendix A35-A36).

Note:

The said written opinion of the District Court of Appeal of Florida, Third District, contains a detailed discussion of portions of the issues involved, but affirms in part and reverses in part the original decisions of the lower court, so that the opinion of the Appellate Court is not completely self-contained. References to the decree as amended in the lower court, together with reference to the mandate of the District Court of Appeal issued pursuant to that opinion of March 22, 1960, are necessary in order to ascertain just what was determined.

In our original petition for certiorari filed in this Court in December, 1960, we attached as an appendix these same opinions. We are now attaching to the appendix supporting this petition for certiorari:

Final Decree of the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, entered on the 14th day of April, 1961 (Appendix A37-A41).

Notice of Interlocutory Appeal to the District Court of Appeal of Florida, Third District, to review the Order and Judgment on the Mandate, entered on the 14th day of April, 1961 (Appendix A42-A43).

Assignments of Error filed on the 17th day of April, 1961 (Appendix (A44-A47).

Order of District Court of Appeal of Florida, Third District, entered May 25, 1961, quashing this interlocutory appeal, based upon the assignments of error and appeal proceeding hereinbefore referred to (132 So. 2d 806) (Appendix A48).

The petition for certiorari filed in the Supreme Court of Florida in June, 1961, copy of which was simultaneously filed with the Clerk of the District Court of Appeal of Florida, Third District, is voluminous, but is a part of the transcript of record submitted herewith under separate cover. The Federal questions involved

were again raised in that petition for certiorari as reflected in the record (Tr. 231-300).

Order of Supreme Court of Florida dated July 24, 1961, denying the petition for certiorari, and the order of the Supreme Court of Florida of September 26, 1961 (133 So.2d 319), denying the petition for rehearing; showing certification of mailing of both orders to the District Court of Appeal of Florida, Third District, and filing therein on September 27, 1961 (Appendix A49-A50).

B. GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

1. At the time the original petition for certiorari was filed in this Court in case No. 559, October Term, 1960, petitioners were confronted with the question as to whether or not the opinion of the District Court of Appeal of Florida, Third District, dated March 22, 1960, reported 119 So.2d 741, was a final judgment or decree to which a petition for certiorari to the Supreme Court of the United States would lie, or did this decree fall into the category of the granting of a new trial by the Appellate Court?

The mandate of the District Court of Appeal of Florida, Third District (Appendix A35-A36) is as follows:

"MANDATE FROM DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

To the Honorable, the Judges of the Circuit Court for the Eleventh Judicial Circuit of Florida, Greeting:

Whereas, Lately in the Circuit Court of The Eleventh Judicial Circuit in and for the County of Dade in a cause wherein

THE CORAL GABLES FIRST NATIONAL BANK, etc.
and PAN AMERICAN BANK OF MIAMI, etc.,
Plaintiffs and Defendants

CONSTRUCTORS OF FLORIDA, INC., et al

(Chancery No. 205613)

the decree of said Circuit Court was rendered June 30, 1958, as by the inspection of the transcript of the record of the said Circuit Court which was brought into the District Court of Appeal, Third District of the State of Florida, by virtue of appeals agreeably to the laws of said State in such case made and provided, fully and at large appears.

And Whereas, at the January Term of said District Court of Appeal holden at Miami, A. D. 1960, the said cause came on to be heard before the said District Court of Appeal on the said record of March, A.D., 1960 the said District Court of Appeal rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It Is Ordered by the Court that the appellants do have and recover of and from the appellees costs in this behalf expended herein taxed at Twenty-five Dollars, and that all other costs shall be taxed in the court in which the appeal was entered, therefore

You Are Hereby Commanded, That such further proceedings be had in said cause as according to right, justice, the judgment of said District Court of Appeal and the laws of the State of Florida, ought to be had, the said decree of the Circuit Court notwithstanding.

Witness, The Honorable Mallory Horton, Chief Judge of said District Court of Appeal, and the seal of said Court at Miami, this 4th day of May, 1960.

s WILLIAM P. CARTER
Clerk District Court of Appeal of Florida, Third District.

A True Copy

ATTEST:

William P. Carter
Clerk District Court of
Appeal, Third District."

At this stage of the proceeding, petitioners were confronted with the opinion of this Court of *Department of Banking, State of Nebraska, v. Pink*, 63 S. Ct. 233, 317 U.S. 264, 87 L. Ed. 254, which in effect held that where a decision of a State Appellate Court was final, with the mere exception as provided for certain administrative or ministerial functions to be performed by the lower court, then the petition for certiorari should be filed within 90 days from the date of that appellate court decision. In the case above mentioned, the Court of Appeals of New York affirmed the decision of the lower courts, but ordered a remittitur entered.

In the case at bar, the District Court of Appeal of Florida, Third District, although reversing the lower court in many factors, including the reversal on the construction of the Federal Statute for usury, attempted to define the formula under the Federal Statute for the assessment of usury penalties, which appeared to be contrary to the plain language of that statute as interpreted by the several decisions of the Supreme Court of the United States.

We were also confronted with a case which was decided by the Supreme Court of the United States subsequent to the *Department of Banking, State of Nebraska, v. Pink decision, supra*, which seemed to change or seriously confuse the decision of that case. This was the case of *Lavender, Admr., v. Kurn*, 67 S. Ct. 111, 329 U.S. 762; 326 U.S. 713, 66 S. Ct. 232; 327 U.S. 645, 66 S. Ct. 740; 189 S.W.2d 253, 195 S.W.2d 460. This decision, which first arose from litigation in the Missouri State Courts, seemed to definitely hold that where the petition for certiorari was directed to the final appellate court of a State, there must be a definite finality before the Supreme Court of the United States would even consider the granting of a petition for certiorari.

Because of the uncertainty of the two decisions of this Court, the petitioners submitted the petition for certiorari to this Court even before the cause was reconsidered in the lower court under the mandate.

It is respectfully shown that the exact application of the ruling of this Court on that subject matter involving the granting of a petition for certiorari in State Court proceedings was not fully clarified as applicable to a situation such as presented here, until the opinion of this Court in the case of *Bert Smith* v. *J. Turner Butler et al., Trustees*, 81 S. Ct. 937, Case No. 313, decided April 24, 1961. This was a very similar type of procedure, involving an opinion and proceedings in the District Court of Appeal of Florida, Third District, wherein this Court granted certiorari (364 U.S. 869, 81 S. Ct. 113, 5 L. Ed. 2d 92).

In that case a suit had been prosecuted in the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, resulting in a verdict for the plaintiff. An ap-

peal was taken to the District Court of Appeal of Florida, Third District, and that Court reversed the judgment of the Circuit Court without passing upon the question of which of two Federal Statutes was applicable. Its decision was based upon the fact that there was not sufficient evidence to sustain a verdict for the plaintiffs. See *Butler v. Smith*, 104 So.2d 868. The case was then sent back for a new trial. The plaintiff again submitted the same record to the trial judge without amendment, and the trial judge, following the reasoning of the Appellate Court, then entered a judgment in favor of the defendant. The plaintiff thereupon took an interlocutory appeal provided for under the Florida Appellate Rules back to the District Court of Appeal of Florida, Third District, and in that appeal alleged that the sole purpose of the appeal was for the purpose of obtaining a record upon which the Court's prior decision of *Butler v. Smith*, 104 So.2d 868, could be reviewed by the Supreme Court of the United States. The District Court of Appeal, as aforesaid, affirmed the judgment on the second appeal (118 So.2d 237). In that opinion it was pointed out by the District Court of Appeal of Florida, Third District, that they noted counsel for the plaintiff was taking the appeal only to satisfy the requirements of the United States Supreme Court rules and statutes applicable thereto. That provision is mentioned in the opinion. Then counsel for the appellants, after that Appellate Court had affirmed the new decision of the lower court, sued out a petition for certiorari to the Supreme Court of Florida, which was denied. Then, and then only, did plaintiff's counsel sue out the petition for certiorari in the Supreme Court of the United States, and this Court granted that certiorari.

In the dissenting opinion it was pointed out (81 S.Ct. 937, 939) that under these proceedings in the State Court,

and since the first appeal from the lower court to the District Court of Appeal of Florida resulted in a prior reversal and a new trial, there could be no final judgment, the review of which might have been sought in the Supreme Court of the United States, until a judgment was entered on a re-trial. This Court granted the petition for certiorari directed to the District Court of Appeal of Florida, Third District, and upheld that type of procedure, but the Court did by a divided opinion rule out the merits of the controversy, but not on the question of the procedure.

Counsel for the petitioners in this case have proceeded on exactly the same routine of exhausting their remedy from the new decree of April 14, 1961, by making appropriate attempt to have the District Court of Appeal of Florida review that final judgment and decree, and also thereafter to have the Supreme Court of Florida take jurisdiction. As above set forth, the District Court of Appeal of Florida, Third District, quashed the appeal from the second final decree of April 14, 1961, and the Supreme Court of Florida refused to take jurisdiction on certiorari directed to that Court, as will show by its order of September 26, 1961.

2. The statutory provision believed to confer jurisdiction of this Court to review the judgment in question by writ of certiorari is 28 U.S.C. 1257, Paragraph 3.

C. QUESTIONS PRESENTED.

1. Has the District Court of Appeal of Florida, Third District, in its opinion of March 22, 1960, effective September 19, 1960, as interpreted and finalized by the order on the mandate entered on April 14, 1961, and as recon-

strued by the District Court of Appeal of Florida, Third District, by its opinion quashing the interlocutory appeal dated May 25, 1961, petition for certiorari and rehearing thereon denied by the Supreme Court of Florida September 26, 1961, violated the specific provisions of United States Statute, Title 12, U.S.C.A., Paragraph 86, in allowing excessive counterclaims and set-offs and penalties not authorized under said statute?

2. Has the District Court of Appeal of Florida, Third District, in its opinion and mandate of March 22, 1960, effective September 19, 1960, as interpreted and finalized by the order on the mandate entered on April 14, 1961, and as reconstrued by the District Court of Appeal of Florida, Third District, by its opinion quashing the interlocutory appeal dated May 25, 1961, petition for certiorari and rehearing thereon denied by the Supreme Court of Florida, September 26, 1961, so construed the effect and operation of the United States Statute, U.S.C.A., Title 12, Paragraphs 85 and 86, limiting the amount of allowance of usury penalty against a National Bank, in such a way as to make it void and inoperative for all practical purposes?

3. Where the Federal Statute covering allowable usury penalties against a National Bank under the provisions of U.S.C.A., Title 12, Paragraph 86, is restricted to a defense in an action to enforce the debt, to a forfeiture of the interest unpaid but contracted for, without any invasion of the principal amount due, or where in the event any usurious interest is actually paid, to a separate suit by the one making the payment for double the amount of the interest actually paid, may a State Court upon alleged equitable grounds by way of penal or compensatory damages impose collateral damages and penalties against a National Bank in excess of the total amount of the principal involved in the transaction?

4. May a State Court, in addition to allowing interest penalties and forfeiture of the amount of the principal (all in excess of the original amount of the loan from the National Bank), impose additional penalties by way of punitive or exemplary damages by forfeiting other collateral which the Bank holds, because it is claimed that the National Bank came into a State Court of Equity without clean hands?

5. Where, after a loan has been consummated by a National Bank to a corporation, and where the privity of contract is solely between the National Bank and the corporate borrower, and where several weeks after the loan is consummated the National Bank, pursuant to its general banking practice under the Federal Reserve System, grants a simple trust receipt or participation for a part of this loan on a straight simple 5% interest participation, does that subsequent transaction with the State Bank relate the whole transaction from the inception as a co-adventure or joint adventure or agency contract so as to avoid the direct application of the Federal Statute on usury, and bring into play the State penalties applicable only to a State Bank?

D. STATUTES AND RULES INVOLVED.

The control question involved which presents the Federal question is the fact that the courts of Florida have ignored the provisions of an Act of Congress affecting and applicable to National Banks, which act has limited and defined the amount of usury penalties which may be invoked by a State or a Federal Court where it is claimed that usury has been collected by a National Bank in a loan made by that Bank to a borrower which is in excess of the laws of the State in which the National Bank made the loan.

For the purpose of this petition for certiorari so as to simplify and pinpoint the violation of the Federal Statute by a State Court, counsel will assume, for the sake of argument, but without any admission at this stage of the procedure, that the usury statutes of Florida were violated by the National Bank. Under that assumption the question arises as to what penalties could a State Court assess against the National Bank, or parties in participation with it, who participated subsequent to the time the initial loan was made by the National Bank to a corporate borrower in the State of Florida.

A brief reference to several controlling statutes of the United States will clarify the background of this question.

United States Code Annotated, Title 12, §1, creates the Bureau of the Comptroller of the Currency, which under the general supervision of the Board of Governors of the Federal Reserve System created the Comptroller of the Currency as the chief officer of the banking system for National Banks under the Federal Reserve System.

United States Code Annotated, Title 12, §21, provides for the creation of National Banks through the operation of the Comptroller of the Currency, which authorized the creation of a complete system for the establishment and government of National Banks as distinct and separate from any power of the State Courts or the laws of the State to interfere with their operation or control except insofar as it may be permitted by the Congress (See *Deitrick* v. *Greaney*, 309 U.S. 190, 84 L. Ed. 694, 60 S. Ct. 480).

Once a National Bank is established, it is solely under the supervision of the Comptroller of Currency, the Federal Reserve Board and the specific acts of Congress, and may be sued, taxed or controlled by State laws or State

Courts only as specifically authorized by the Acts of Congress.

Congress adopted two sections which are applicable to usury claims or penalties against National Banks, regardless of what State the banks may be operating in. U.S.C.A., Title 12, § 85, is as follows:

> *Rate of interest on loans, discounts and purchases* Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such

purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

Title 12, § 86, is as follows:

"*Usurious interest; penalty for taking; limitations*
The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, that such action is commenced within two years from the time the usurious transaction occurred."

It has been judicially determined over a period of many years that the provisions of Section 85 of Title 12 and Section 86 fixing the rate of interest which may be taken by a National Bank, and imposing penalties for taking usurious interest, are exclusive of State legislation and supersede the State laws so far as National Banks are concerned. See *Schuyler Nat. Bank* v. *Gadsden*, 191 U.S. 451, 24 S. Ct. 129, 48 L. Ed. 258.

In addition to the above, there is involved the construction of Comptroller of Currency Ruling 1135A, providing for, and defining the status of, and participation permitted by a National Bank with members of the Federal Reserve System, whether State or Federal. This is as follows (see Official Rules and Regulations of Comptroller of Currency, United States of America):

"Comptroller of Currency Ruling 1135A.

1135A. Sale of loan participations to other banks on a 'last in-first out' basis.

The sale of a participation in a loan to another bank (usually the sale of the 'overline' or legally excessive portion of a loan) under an arrangement whereby the placed portion of the debt must first be extinguished subordinates the interest of the selling bank. It is unsound to place the selling bank in a position whereby any loss that may occur on the entire loan up to the amount of the selling bank's participation must be borne by it, and 'overline' participations the intent and purpose of R.S. 5200 would be nullified under an agreement having this effect. To avoid this possibility, participation arrangements giving to one of the participating banks an earlier maturity or preference with respect to payment of the obligation(s) in the regular course of business, should provide that in the event of default (interest and or principal payments past due and unpaid for such period as the participants may by agreement determine) on the loan, the appointment of a receiver, or bankruptcy of the borrower, the participating banks shall share in all subsequent loan payments and collections in proportion to the percentage of participation held by each bank at the time of the default, the appointment of a receiver, or bankruptcy. With respect to participations in real estate loans see Paragraph 2715."

E. STATEMENT OF THE CASE.

This suit was instituted in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, by The Coral Gables First National Bank, seeking to foreclose three separate and distinct notes and mortgages. The mortgages encumbered primarily equipment belonging to Constructors of Florida, Inc., the mortgagor. One of the

notes was also secured by the assignment of a public contract for sewer construction work for the City of West Palm Beach, Florida, which contract had been awarded to Constructors of Florida, Inc. The other co-plaintiff, Pan American Bank of Miami, a Florida state banking corporation, also joined as co-plaintiff because it held a certificate of participation from The Coral Gables First National Bank evidencing the purchase of a participation in the loans in question. The notes and mortgages, however, ran solely to The Coral Gables First National Bank. The defendant, Constructors of Florida, Inc., filed an answer setting up the defense of usury and also filed a counter-claim in which it was alleged that the loan transactions in question were usurious in violation of Section 687.04, Florida Statutes, and 687.07, Florida Statutes, and prayed that the Court invoke both statutes, not only against The Coral Gables First National Bank, but as against any equitable right of distribution in favor of the Pan American Bank of Miami by virtue of its participation agreement with The Coral Gables First National Bank.

Briefly, the pertinent facts are that on July 25, 1956, Constructors of Florida borrowed $22,222.32 from The Coral Gables First National Bank, and secured the same by a chattel mortgage on certain equipment of Constructors of Florida. One day prior thereto, on July 24, 1956, the said National Bank had made a loan in the principal amount of $148,305.36, also secured by chattel mortgage upon equipment of Constructors of Florida. Shortly thereafter The Coral Gables First National Bank made an additional loan to Constructors in the amount of $442,400.00, which loan was secured by an assignment of a water and sewer contract which Constructors had entered into with the City of West Palm Beach, Florida. Also, as collateral security for this loan there was a chattel mortgage encumbering

certain machinery and equipment of Constructors upon which The Coral Gables First National Bank held two prior liens by reason of two prior loans made in July of 1956. The promissory note evidencing the loan was payable in twenty-three monthly installments of $3,000.00 each and a balloon installment at the end of the twenty-fourth month of $373,400.00, with interest at the rate of 5% per annum. The Coral Gables First National Bank disbursed the proceeds of this loan as follows:

A. Sixty Thousand Dollars was utilized to repay a prior loan made by Constructors from The Coral Gables First National Bank in the amount of Sixty Thousand Dollars.

B. Two Hundred Two Thousand Five Hundred Sixty-Two Dollars and Thirty-Eight Cents was deposited directly to the account of Constructors of Florida in The Coral Gables First National Bank.

C. Forty-Four Thousand Two Hundred Forty Dollars was retained by The Coral Gables First National Bank as advance interest for two years.

D. One Hundred Thirty-Five Thousand Five Hundred Ninety-Seven Dollars and Sixty-Two Cents was deposited into an account of Constructors of Florida known as Collateral Account No. 1. This account required the signature of an officer of The Coral Gables First National Bank and an officer of Constructors of Florida. The funds in Collateral Account No. 1 were to be disbursed as the water and sewer contract progressed, in the nature of a construction advance. Disbursements were made from Collateral Account No. 1 upon request of Constructors from November 23, 1956 through January 7, 1957, when the entire Collateral Account No. 1 was exhausted by reason of disbursing the same to Constructors of Florida.

On November 19, 1956, The Coral Gables First National Bank offered a participation to Petitioner, Pan American Bank of Miami, a State bank, in the loan to Constructors to the extent of $243,320.00, the same being a 55% participation in the loan. The Pan American Bank was to receive 5% simple interest on its participation. It did not receive any part of the $44,240.00 retained by The Coral Gables First National Bank as advance interest. The participation certificate was approved by the Board of Directors of Pan American Bank of Miami on November 28, 1956, and accepted on that same date. Beginning about November 29, 1956, and continuing through March 1, 1957, various payments became due to Constructors of Florida from the City of West Palm Beach, and these moneys were deposited by prior agreement between The Coral Gables First National Bank and Constructors of Florida into an account of Constructors known as Collateral Account No. 2. This account also required the signature of one officer of Constructors and one officer of The Coral Gables First National Bank. As the monthly payments became due, there was disbursed from Collateral Account No. 2 the amount of each monthly payment. This situation continued until March of 1957. At that time Constructors, by reason of other jobs which it had undertaken, was in financial difficulty and in default under both the prior mortgages given in July, 1956, to secure loans in the original principal amounts of $22,222.32 and $148,305.36, respectively. The Coral Gables First National Bank, exercising its rights under its agreement with Constructors of Florida as contained in the promissory note, applied all of the moneys in Collateral Account No. 2 in reduction of the indebtedness of Constructors on its note of November 14, 1956, thereby reducing the principal balance outstanding to $253,859.33. At this point, pursuant to the contractual agreement between Constructors of Florida and The Coral

Gables First National Bank, the Bank was obligated to adjust the interest. This was done, and a credit was given to Constructors of Florida of $35,584.06, as is evidenced by the new agreement entered into March 20, 1957, between Constructors of Florida, The Coral Gables First National Bank and American Surety Company of New York, which was the surety for Constructors on certain bonds. This new agreement accomplished basically the following:

All of the proceeds becoming available to Constructors of Florida as work progressed on the water and sewer contract of the City of West Palm Beach were to be paid to American Surety Company, as Trustee. The $442,400.00 loan of November 14, 1956, which had been reduced by payments and credits to $218,275.27, was rewritten on a demand basis, with the provision that no demand would be made by The Coral Gables First National Bank so long as the water and sewer contract with the City of West Palm Beach was not in default. The payments coming into the hands of the Trustee were then allocated so that a certain amount was to be paid to The Coral Gables First National Bank in order to keep the payments current on the two July, 1956, loans which were secured by a first mortgage on the equipment of Constructors. This is the first time that the July, 1956, loans were in any way connected with the November 14, 1956, loan. Sixty-five per cent of the payments received by the American Surety Company were then to be applied against the new demand note of $218,275.27, and the balance of the funds was to be available to American Surety Company and Constructors of Florida for use in completing the City of West Palm Beach contracts.

This new arrangement continued until on or about August 25, 1957, at which time the City of West Palm

Beach claimed certain breaches by Constructors of the water and sewer contracts, and attempted to take over the remaining work itself. Thereafter, The Coral Gables First National Bank, and Pan American Bank of Miami, as a participant, brought foreclosure proceedings against Constructors. It was at this time that Constructors pleaded the defense of usury.

The lower Court found that the loan transaction of November 14, 1956, was usurious; that the re-negotiated agreement of March 20, 1957, did not cure the usurious taint, and assessed damages against The Coral Gables First National Bank for double the interest received by that bank (which included the $44,240.00 which was retained by the bank as advance interest although never actually paid) and gave credit against the amount so computed for the interest credited to Constructors upon the re-negotiation on March 20, 1957. The lower Court also awarded damages against the Pan American Bank of Miami in the total sum of $265,999.27, representing the principal and interest received by both the Pan American Bank of Miami and The Coral Gables First National Bank. The Court also cancelled the remaining unpaid principal and interest, and referred to this as a "liability of both Plaintiff banks."

In addition to the above damages, the Court awarded attorneys' fees against the banks in the amount of $45,000.00 and $27,347.58 respectively. The District Court of Appeal of Florida, Third District, reversed the lower Court as to the award for attorneys' fees, and found "at the National Bank Act applied to The Coral Gables First National Bank and, therefore, the forfeiture of the principal amount would be reversed as to The Coral Gables First National Bank, and that bank could recover that percentage of the principal amount of the loan which it

had furnished. The balance of the findings of the lower Court were affirmed, including a finding by the lower Court that the plaintiff banks could not foreclose the mortgages securing the loans of July 24, 1956, and July 25, 1956, to which no defense of usury had been raised, on the theory that the banks had not come into equity with clean hands--not with respect to the two loans in question, but with respect to the subsequent transaction of November 14, 1956.

On April 14, 1961, the lower Court entered its final order and judgment on the mandate, which purported to be in conformity with the opinion of the District Court of Appeal of Florida, Third District. However, the lower Court did not follow the mandate of the District Court of Appeal and review the entire question of usury, but proceeded to enter a final judgment against The Coral Gables First National Bank in the amount of $74,867.52, with interest from July 2, 1958, and a judgment against Pan American Bank of Miami in the amount of $265,999.27, with interest from July 2, 1958. The lower Court did, however, reserve unto The Coral Gables First National Bank the sum of $11,271.20, on the theory that this represented the unpaid balance of the principal amount advanced by The Coral Gables First National Bank. However as an additional usury penalty, the lower Court held that the lien of The Coral Gables First National Bank securing the indebtedness was not enforceable, not only as to the November 14, 1956, loan transaction, but also as to the two prior chattel mortgages of July, 1956. (For copy of decree of April 14, 1961, see Appendix A37-A41, Tr. 176-186).

The lower Court then went on to inject several new features which had not been passed upon by the District Court of Appeal. First, the lower court stated that it was not determining whether the two prior loan trans-

actions of July, 1956, were in default, inasmuch as the United States District Court for the Southern District of Florida, in proceedings for the reorganization of Constructors of Florida, Inc., had assumed jurisdiction of that claim. Secondly the lower court affirmatively held that the judgments awarded to John Nicholas, as Trustee for Constructors of Florida, Inc., were not subject to off-set by reason of the claims of the banks against Constructors of Florida, Inc. Thirdly, the lower court found that the lien of American Surety Company of New York on the chattels and equipment of Constructors of Florida, Inc., in the amount of $1,367,379.19 and interest thereon, and attorneys' fees in the amount of $72,347.58, were superior to any claim of the banks.

An interlocutory appeal under the Florida Appellate Rules was immediately filed seeking the review of the decree of April 14, 1961, to the District Court of Appeal of Florida, Third District (See Appendix A42-A43, Tr. 197-198). The assignments of error in which the construction of the Federal Statute, Title 12, Sections 85 and 86, by the lower court was complained of, are shown at Appendix A44-A47, Tr. 199-202. These assignments of error squarely raise the points that the decision and final judgment upon which execution issued, by the Circuit Court of Dade County, Florida, on April 14, 1961, purporting to carry out the opinion, decision and mandate of the District Court of Appeal of Florida, Third District, resulted in a construction of the Federal Statutes which violated the plain terms and conditions of the Federal Statute as to penalties imposed and inconsistent with the opinions of this Court on the same subject matter.

F. SPECIFICATION AS TO THE STAGE OF THE PROCEEDING IN THE COURT OF THE FIRST INSTANCE AND IN THE APPELLATE COURT AT WHICH AND THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED, AND THE METHOD OF RAISING SAME.

At the time the first petition for certiorari was filed in this Court under the October Term, 1960, Cause No. 559, a certified typewritten copy of the record of the proceedings in the trial court, as well as the proceedings in the District Court of Appeal of Florida, Third District, on the first appeal, were set forth. These records reflect that in the initial pleadings in the trial court when the plea of usury was interposed by Constructors of Florida, extensive motions to dismiss the counterclaim for usury were filed, setting up the Federal Statutes, Title 12, Sections 85 and 86, U.S.C.A. The opinions and partial final decree of the trial court, to-wit, the Circuit Court of Dade County, Florida, and in particular the amended decree of July 2, 1958 (Appendix A1-A19, Tr. 1-21), reflect that the issues with reference to the construction of the Federal Statutes were raised, were considered by the lower court, and applied in such a way as to render the Federal Statutes and the construction placed thereon by this Court in a previous decision, as a nullity. When the appeal was taken from that order, the opinion of the District Court of Appeal of Florida, Third District (119 So.2d 741) reflects that under the assignments of error filed, the question of the construction of the Federal Statutes was squarely raised and squarely passed upon by the said Appellate Court. A copy of that opinion is set forth in the Appendix to this petition (Appendix A19, Tr. 230).

The same question of the erroneous construction of the Federal Statute was raised in the petition for certiorari filed in June of 1960 in the Supreme Court of the State of Florida, but that Court refused to take jurisdiction, leaving the opinion of the District Court of Appeal of Florida, Third District, as above mentioned (119 So.2d 741), as the opinion of the court of last resort.

When the new proceedings were then commenced on April 14, 1961, in the Circuit Court of Dade County, Florida, pursuant to the mandate of the District Court of Appeal of Florida, Third District, the opinions reflect that that Court acted in a summary capacity without actually conducting any new proceedings or re-trial of the issue. A petition for rehearing was filed in that Court (Tr. 182-192). Ground 2 of that petition for rehearing directed to the lower court raised the specific federal question, and pointed out that the lower court had again failed to recognize or properly construe the said Federal Statutes. That petition for rehearing was denied by the Circuit Judge and was stricken by order of the Court dated the 17th day of April, 1961 (Tr. 196).

When the interlocutory appeal was filed to review the decision of the lower court of April 14, 1961, and the order denying the petition for rehearing of April 17, 1961, as above mentioned, appeal was taken from both orders, one the final judgment and execution above mentioned dated April 14, 1961, and order striking the petition for rehearing on the 17th day of April, 1961. The assignments of error supporting that notice of appeal (Appendix A44-A47, Tr. 199-202) reflect that the Federal question was asserted in assignments of error numbers 1, 4, 6, 9, 13 and 14. As above pointed out, the District Court of Appeal of Florida, Third District, granted a motion to quash this appeal and refused

to pass upon any of the points raised, including the Federal questions raised by the assignments of error concerning the improper construction of the penalty features permitted under U.S.C.A., Title 12, Sections 85 and 86.

The same Federal questions were presented in the lengthy petition for certiorari filed with the Supreme Court of the State of Florida on the 8th day of June, 1961, copy of which was required to be filed with the District Court of Appeal of Florida, Third District, as a condition for the application to the Supreme Court of the State of Florida. This is a voluminous petition and is attached as a part of the record in this case (Tr. 231-300). However, the Supreme Court of Florida, without taking jurisdiction, denied the petition for certiorari as reflected by its final orders of July 24, 1961, rehearing denied September 26, 1961 (132 So.2d 806; 133 So.2d 319; Tr. 301-302. Appendix A49-A50).

As reflected by the above references, the Federal question was raised in every stage of the proceedings.

G. REASONS FOR GRANTING THE WRIT.

The District Court of Appeal of Florida, Third District, has decided an important and a novel Federal question in the construction of Title 12, U.S.C.A., Paragraphs 85 and 86 (which limits the right of a State Court to impose penalties for alleged usurious contract upon a National Bank doing business within the State), which is in direct conflict with the plain and unambiguous provisions of that statute, as construed by this Court in the case of *McCollum v. Hamilton National Bank of Chattanooga*, 58 S. Ct. 568, 303 U.S. 245, 82 L. Ed. 819, and many prior opinions cited therein.

As established by the doctrines of this Court in said opinion and in prior opinions referred to, a National Bank operating within the State of Florida, even if guilty of violating the Florida State Usury Laws (which is not conceded by the petitioners in this case), could only be denied in a foreclosure action in equity in the State Court the right to recovery of the amount of interest contracted for but not paid, leaving the principal sum intact and subject to foreclosure and judgment.

In the event any interest is paid which is found to be usurious or in violation of the State Usury Statutes, then under the provisions of Title 12, U.S.C.A., Paragraph 86, the statute makes this clear and unambiguous provision:

> "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same."

In the case at bar, the highest court of Florida having jurisdiction over this subject matter has by its ruling permitted affirmative relief against the National Bank by way of set-off and counterclaim in the foreclosure action in the equity courts of Florida; not simply a denial of the right to recover the interest contracted for but unpaid, but a discharge of the principal amounts involved, together with a penalty forfeiture of the taking of security away from the National Bank on other mortgages not involved in the usury claim in excess of a value of $110,000.00.

As further grounds for granting the certiorari, the record in this case discloses that the National Bank held two chattel mortgages given by Constructors of Florida, one on the 24th of July, 1956, and one on July 25, 1956, securing separate notes, and upon which separate mort-

gages were given on separate personal property and equipment. Both of these mortgages calling for approximately $7,000.00 per month total payments were in default on September 20, 1957, when this foreclosure action was instituted on the third loan of November 14, 1956.

As part of the security for this third loan transaction, in addition to other collateral, Constructors of Florida had given a second mortgage in the nature of a blanket mortgage upon the same equipment that had been covered by the first two mortgages of July, 1956. Under the requirements of the Florida law, the plaintiff is required to foreclose all of his mortgages against the same security at the same time and in the same action, and thus these two mortgages about which there was no question of usury ever raised, were sought to be foreclosed in the same equity action. During the progress of the foreclosure, Constructors of Florida became a bankrupt, and a trustee in bankruptcy was appointed in December, 1957.

No issues were raised in the pleadings concerning the validity of the first two mortgages or the first priority lien which those mortgages created on the personal property and equipment. The opinions of the Lower Court, affirmed by the District Court of Appeal of Florida, sought to be reviewed, imposed a collateral penalty upon the National Bank by cancelling the first mortgage lien which the National Bank held against the personal property, machinery and equipment of the two July mortgages, citing as the only reason therefor that the National Bank had come into equity with unclean hands. This resulted in a loss to the Bank of its first mortgage on equipment which was worth the amount of the unpaid balances on the first two mortgages, and deprived the National Bank of its opportunity and contractual right to be satisfied as to those first two mortgages out of the collateral security at a time

when the maker of the note was in bankruptcy and totally insolvent as far as the general creditors' claims were concerned. This amounted to depriving the petitioners of a valuable property right without due process of law or compensation.

These actions collectively, not only violated the provisions of the 5th and 14th Amendments of the Constitution of the United States for protection of the petitioners under those amendments, but were a clear and clean-cut violation of Title 12, U.S.C.A., Paragraph 86.

The case of *McCollum* v. *Hamilton National Bank of Chattanooga*, 303 U.S. 245, 58 S. Ct. 568, 82 L. Ed. 819, decided in 1938, was the last expression by this Court upon the issues involved in this case. That decision has been the recognized authority controlling the operation and management of National Banks ever since. This decision of the Supreme Court of the United States has since been recognized by the Court of Appeals of the Sixth Circuit in the case of *Schumacher* v. *Lawrence*, 108 F.2d 576, a 1940 decision, in which that Court reiterated and applied to a similar case the principles laid down by this Court in the *McCollum* decision. Under the *Schumacher* decision and construing this Court's opinion in the *McCollum* case, the Court of Appeals for the Sixth Circuit again applied the Federal doctrine holding that under the Federal Statute 12, U.S.C.A., 86, usurious interest which has been paid to a National Bank must be recovered back in an independent action, which remedy is exclusive since the Federal Statute controls, and again quoted from the *McCollum* case as holding (577):

> "'One paying a national bank usurious interest and entitled to enforce the penalty may not recover it by way of set-off in a suit brought upon his note to the bank.'"

It was also held in the *Schumacher* case that where a National Bank brought a foreclosure action in a State Court (in Michigan), any claim for interest paid under a usurious loan could not be set off in the mortgage foreclosure suit.

The usury penalty invoked in this case in the defense and counterclaim was not restricted as against the National Bank to double the amount of the interest actually paid, which would have been only a nominal amount and was not restricted to a denial to the Bank of its right to collect interest contracted for, but not paid, but concluded in a judgment against the National Bank forfeiting an amount in excess of the principal of the note, together with collateral damages of over $110,000.00 penalty on other issues and other securities held by the Bank, purely as punitive penalties. This decision by the District Court of Appeal of Florida flaunts the Federal Statute, flaunts the long series of opinions by this Court, and if allowed to stand, would create a precedent that would be disastrous to National Banking interests throughout the United States, and particularly in the State of Florida.

H. ARGUMENT.

POINT 1.

Has the District Court of Appeal of Florida, Third District, in Its Opinion of March 22, 1960, Effective September 19, 1960, As Interpreted and Finalized by the Order on the Mandate Entered on April 14, 1961, and As Re-Construed by the District Court of Appeal of Florida, Third District, by Its Opinion Quashing the Interlocutory Appeal Dated May 25, 1961, Petition for Certiorari and Rehearing Thereon Denied by the Supreme Court of Florida September 26, 1961, Violated the Specific Provisions of United States Statute, Title 12, U.S.C.A., Paragraph 86, in Allowing Excessive Counterclaims and Set-Offs and Penalties Not Authorized under Said Statute?

The United States Statute reflected in Title 12, Paragraph 86, must be read in relationship to Paragraph 85 which just precedes it. Paragraph 85 in general provides that any National Bank may:

> "take, receive, reserve, and charge on any loan or discount made * * * interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the bank is located, which ever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. * * *."

In Florida, the rate of interest fixed on loans to corporations is covered in Section 687.03, as shown in the 1955 Florida Statute.

Prior to 1953, a corporation under the Florida law was prohibited from pleading usury. This law was amended, effective October 1, 1953, and that law was in November, 1956, as follows:

> "Section 687.03. Unlawful rates of interest defined; proviso.—It shall be usury and unlawful for any person, or for any agent, officer or other representative of any person, to reserve, charge or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money, except upon an obligation of a corporation, a rate of interest greater than ten per cent per annum, either directly or indirectly, by way of commission for advances, discounts, exchange, or by any contract, contrivance or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of ten per cent; and *such transactions with a corporation shall, whereby the corporation pays interest, be usury and unlawful if for a rate of interest greater than fifteen per cent per annum. The provisions of this section shall not apply to sales of bonds in excess of one hundred dollars and mortgages securing the same, or money loaned on bonds.*"

The penalty for one class of usury under the Florida law is set forth in Section 687.04, as follows:

> "Penalty for usury; not to apply to transferee of negotiable paper unless usury appears on face.—Any person, or any agent, officer or other representative of any person, willfully violating the provisions of Section 687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved, or has been paid, then and in that event the person, who has taken or reserved, or

has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of interest so reserved, taken or exacted; * * *."

Where the interest is alleged to be in excess of 25%, then Section 687.07 applies, which is as follows:

"Forfeiture and penalty in case of excessive interest or charges.—Any person, or the agent, officer or other representative of any person, lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees or otherwise, or for forbearing to enforce the collection of such moneys or otherwise, shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, and on conviction, be fined not more than one hundred dollars, or be imprisoned in the county jail not more than ninety days."

Under the Florida law as above set forth, if there is usury in a normal loan transaction in Florida, or where a State Bank is directly involved and is a primary lender, there are three classifications:

(1) If the usury is above the legal rate as far as a corporation is concerned of 15% per annum and under 25%, the interest contracted for shall be forfeited and only the principal amount may be collected.

(2) If the interest has been paid or reserved in such a way as to be the equivalent of payment, then that amount

so paid may be recovered back in a sum double the amount, that is to say, the actual interest paid and a one time penalty. If $1,000 has been paid, then the total recovery would be $2,000, with the principal intact.

(3) If, on the other hand, the interest is computed and found to be in excess of 25%, then Section 687.07 applies, and if it shall be established that the lender has wilfully and knowingly charged or accepted any sum of money greater than the sum of money loaned, and an additional sum of money equal to 25% per annum, etc., the lender shall forfeit to the party charged such usurious interest, the entire sum, both principal and interest. In that event, even though interest has been paid, the amount paid is not doubled. See *Rosenblum* v. *Hart*, 95 So.2d 18.

Interest which is simply contracted for in advance, such as the discount involved in this case, is not under the Florida law interest paid or reserved. See *Wenck* v. *Insurance Agents Finance Corporation*, 99 So.2d, 883, and as interpreted also by a recent decision of the United States Court of Appeals, Fifth Circuit, Case No. 18071, *Conner Air Lines, Inc., and F. A. Conner, Appellants*, v. *Aviation Credit Corporation et al., Appellees*, Opinion rendered June 30, 1960, 280 F.2d 895, petition for certiorari denied, 81 S. Ct. 274.

This case involved other issues, but in the body of that opinion as printed and issued by the United States Court of Appeals, Fifth Circuit, in construing the two Florida Statutes, 687.03 and 687.04, that Court said:

> "If there was not any payment, or any taking or reserving of usurious interest, then the full amount of the principal, without interest, may be recovered."

quoting *Wilson* v. *Conner*, 106 Fla. 6, 142 So. 606; *Ross* v. *Atlas Finance Corporation*, 113 Fla. 793, 152 So. 410; *McGillick* v. *Chapman*, 134 Fla. 220, 184 So. 26.

Then, further quoting from said opinion, that Court said:

> "The provision for the forfeiture of double the amount of the interest exists only if the usurious interest has been paid or has been taken or reserved. Certainly Conner did not pay the so-called bonus to Aviation Credit. Was it otherwise paid, taken or reserved? It was not, unless it can be said that a paying, taking or reserving resulted from the transfer of the amount of the bonus from Aviation Credit to Smith Aircraft. The undertaking of Conner to pay Aviation Credit the $33,310.18 constituted usury, but only because of the relationship between the two Smith corporations. By reason of that same relationship we are precluded from saying that the transfer by one of them to the other is the paying, taking or reserving of the usurious bonus."

The doctrine of that case, quoting the Supreme Court of Florida decisions, is exactly the same doctrine as laid down by the District Court of Appeal of Florida, Third District, in the case of *Wenck* v. *Insurance Agents Finance Corp.*, 99 So.2d 883, above mentioned.

So that in the case at bar, there was no taking of payment of any interest up to March 7, 1957, except $5,615.44. Thereafter by the contract of March 20, 1957, a new note was entered into on a straight 15% rate on unpaid principal balances. Even under that concept, there was an additional interest paid on the new note of March 20, 1957, of $5,370.35 (119 So.2d 741, 745). So that from the beginning of the loan of November 14, 1956, until all parties ceased making payments in June of 1957, the total amount of interest actually paid either under the November 14, 1956 arrangement or the March 20, 1957, arrangement, was $10,985.79.

If a separate suit had been filed by Constructors of Florida or its Trustee in Bankruptcy, and if all issues

had been determined against the Coral Gables First National Bank, the total recovery would have been twice that amount of money. In addition to that, of course if there was any unpaid interest contracted for but not paid, that amount and that amount only, could have been offset in the foreclosure action.

The computations contained in the opinion of the District Court of Appeal of Florida, Third District (119 So.2d 745), are utterly confused and provide for at least three times the amount of interest that could be charged under any concept of the Florida law.

In the case of *McCollum* v. *Hamilton National Bank of Chattanooga*, 303 U.S. 245, 58 S. Ct. 568, a very similar situation was involved. This case was heard on writ of certiorari to the Supreme Court of the State of Tennessee. McCollum was the Trustee in Bankruptcy of Lookout Planing Mills. He brought a suit in the chancery court of Hamilton County, Tennessee, to recover from the Hamilton National Bank of Chattanooga, but he confined his suit to a claim under Federal Statute, 12 U.S.C.A., Paragraphs 85 and 86. The State Court followed that statute but after finding that the bank had received $5,235.55 in interest which was usurious under the Tennessee law, gave a judgment against the bank for double that amount. At that time there was still $25,493.70 left on notes, and the State Court permitted a set-off, simply crediting twice $5,235.55 as against the total claim for approximately $25,000.

This Court reversed the Lower Court on the question of set-off, but in the body of the opinion this Court laid down certain definite rules in which it said (570):

> "The penalty is to be enforced according to the terms of the statute. Guilt being established, the law itself fixes the punishment at precisely twice the usurious exaction paid; it may not be enhanced or mitigated be-

> cause of aggravating circumstances or equitable considerations. As the sum demanded is certain, recovery in an action of debt is authorized, though the claim arises not in contract but in tort. * * * The liability can only be enforced in an action 'brought specially and exclusively for that purpose—where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case.' Barnet v. National Bank, 98 U.S. 555, 559, 25 L. Ed. 212. One paying a national bank usurious interest and entitled to enforce the penalty may not recover it by way of set-off in a suit brought upon his note to the bank. Haseltine v. Central Bank of Springfield, 183 U.S. 132, 137, 22 S. Ct. 50, 46 L. Ed. 118; * * *"

Then the Court said (570):

> "The right of set-off here involved does not at all depend upon the Tennessee statute upon which, at least in part, the state supreme court rested its ruling."

Then the Court said (571):

> "Liability for the penalty does not arise in contract but is laid in invitum as a disciplinary measure. * * * As the penalty may be enforced only in a suit brought exclusively for that purpose so that the trial of guilt or innocence may not be embarrassed by any other question, it is plain that the payment of any debt owed by the plaintiff to the bank may not be held a condition precedent to the determination of that issue. Punishment for usury does not depend upon payment of the borrower's debt."

The case was reversed.

Prior thereto, in a long line of decisions, this Court has established the doctrine that while the Federal law permits certain suits affecting National Banks to be tried in the coordinating State Courts, yet that power is restricted to the right of the State Court to enforce the provisions of

the Federal Statute, irrespective of any State laws. See *Farmers & Mechanics National Bank* v. *Dearing*, 91 U.S. 29, 23 L. Ed. 196, in which this Court said:

> "The national banks organized under the Act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge.
>
> Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.' Against the national will 'the States have no power, by taxation or otherwise, to retard, impede, burthen or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.'"

In many other cases which we will simply mention, this Court has taken jurisdiction either by writ of error under the old procedure, or by writ of certiorari under the general procedure to review and to reverse the decisions of State Courts when the State Courts have gone beyond the restrictions in the Federal Statute. See *Brown* v. *Marion National Bank of Lebanon*, Kentucky, 169 U.S. 416, 18 S. Ct. 390. *First National Bank of Jacksboro* v. *Lasater*, 196 U.S. 115, 25 S. Ct. 206. *Talbot* v. *First National Bank of Sioux City*, Iowa, 22 S. Ct. 612, 185 U.S. 172.

There is one statement from this opinion which is pertinent, in which the Court said:

> "The denial by a state court of a right of action expressly based on an act of Congress presents a Federal question which gives the Supreme Court of the United

States jurisdiction to review a decision of such state court."

Further in the body of the opinion, this Court said (p. 616):

"Two cases are provided for (1) where illegal interest has been taken, received, or charged; (2) where illegal interest has been paid. In the first case the entire interest which the 'evidence of debt carries with it' shall be deemed forfeited. In the second case the person who has paid 'the greater rate of interest may recover twice the amount of interest thus paid.'"

In a later case, this Court passed upon the same subject in reversing the Supreme Court of South Dakota—*Patrick B. McCarthy* v. *First National Bank of Rapid City*, South Dakota, 32 S. Ct. 240, 223 U.S. 493.

POINT 2.

Has the District Court of Appeal of Florida, Third District, in Its Opinion and Mandate of March 22, 1960, Effective September 19, 1960, As Interpreted and Finalized by the Order on the Mandate Entered on April 14, 1961, and As Reconstructed by the District Court of Appeal of Florida, Third District, by Its Opinion Quashing the Interlocutory Appeal Dated May 25, 1961, Petition for Certiorari and Rehearing Thereon Denied by the Supreme Court of Florida, September 26, 1961, So Construed the Effect and Operation of the United States Statute, U.S.C.A., Title 12, Paragraphs 85 and 86, Limiting the Amount of Allowance of Usury Penalty Against a National Bank, in Such a Way As to Make It Void and Inoperative for All Practical Purposes?

In the statement of the case we have clearly pointed out that the Florida Courts, as set forth in the opinion by the District Court of Appeal of Florida, Third District,

while recognizing that a Federal Statute exists, completely ignored the effect of that statute by attempting to say that when the National Bank loaned $442,400 on November 14, 1956, and charged as advance interest $44,240, that that was interest paid. That was in violation of the Federal Statute.

If the State Court had simply denied the right of the National Bank to collect the $44,240, or denied it the right to collect an additional 5% for the period of time the loan was in force and effect, this case would have presented a different question. But the Court attempted to double that amount, claiming that there had been $99,710.88 penalty and double the interest collected subsequent to March 20, 1957, of $10,740.70, making a total of double the interest paid of $110,451.78.

The schedule as shown in the reported opinion (119 So.2d 741, 745) contains a figure as the liability of the Coral Gables First National Bank. Then the Court gave a credit termed:

> "Less' amount credited to principal on renegotiation $35,584.06."

or a total of alleged recovery for interest paid, or double the amount of the interest paid, less credits, of $74,867.52. This claim was not based simply upon forbearance, because admitting $35,584.06 credit as against the original $44,240 interest taken in advance, there could only have been an amount of interest of the difference, or about $9,000, which would come under the classification of interest contracted for, but not paid.

Applying the Federal Statute, and if there was usury, the State Court might have been within its rights to have permitted the National Bank to collect some $400,000 of

principal, but denied its right to collect the contractual balance of some $9,000. That is the only result that could have been reached by the State Court consistent with the Federal Statute. During that interim, taking an over-all figure of an additional $11,000 interest actually paid, that amount could only have been collected, not by offset or counterclaim in the equity foreclosure action, but must be the subject matter of a separate and distinct action under the *McCollum* decision.

In addition to this glaring error in conflict with the Federal Statute, we have heretofore pointed out in the statement of the case that the State Court caused a forfeiture of approximately $110,000 in value of collateral to the two mortgages of July 24 and 25, 1956, respectively, and decreed that the National Bank would forfeit or lose all of its principal claim, balance due of $151,802.46, with the exception of 7% thereof, or an additional collateral penalty of approximately $140,000.

In addition to those penalties, the State Bank, which only had a trust interest participation of $243,000, approximately, out of the $442,400, was decreed to be liable:

For the return of principal and interest paid to March 20, 1957	$194,156.11
For principal paid subsequent to March 20, 1957	66,472.81
Interest paid subsequent to March 20, 1957	5,370.35
Or a total of	$265,999.27,

apparently upon the theory that the Pan American Bank's subsequent participation amounted to 92% of $263,000, which figure was drawn out of the thin air.

These payments are duplications, because there was never any money paid by Constructors of Florida to the Pan American Bank. All payments were paid to and handled in the name of and by the Coral Gables First National Bank. These items are double charges of erroneous figures from the inception.

We can only demonstrate the complete error by pointing out by reference to the computations in 119 So.2d 745, that counting the item of liability to Pan American Bank of principal and interest paid to March 20, 1957, as $194,156.11, and deducting therefrom the gross interest paid on the whole contract of $5,615.44, that would be a net yield of principal repayment to Pan American Bank of $188,540.67. Adding the next item of principal alleged to have been paid to Pan American Bank after March 20, 1957—$66,472.81, to the item of $188,540.67, would result in a total of $255,013.48 principal repaid to the Pan American Bank, when they did not advance on the interim certificate of November 28, 1956, but $243,000.

In addition to these erratic figures, the Court then cancelled the balance of $151,802.46 principal and interest in addition thereto, making a total of $172,585.29 cancelled.

POINT 3.

Where the Federal Statute Covering Allowable Usury Penalties Against a National Bank under the Provisions of U.S.C.A., Title 12, Paragraph 86, Is Restricted to a Defense in an Action to Enforce the Debt, to a Forfeiture of the Interest Unpaid but Contracted for, Without Any Invasion of the Principal Amount Due, or Where in the Event Any Usurious Interest Is Actually Paid, to a Separate Suit by the One Making the Payment for Double the Amount of the Interest Actually Paid, May a State Court upon Alleged Equitable Grounds by Way of Penal or Compensatory Damages, Impose Collateral Damages and Penalties Against a National Bank in Excess of the Total Amount of the Principal Involved in the Transaction?

There are certain portions of the argument directed to the first two points which are directly applicable to questions raised under Point 3. We will not reiterate all of those arguments, but we will adopt that portion in Points 1 and 2 which is applicable to the first phase of Point 3.

The specific difference in Point 3 is the fact that the State Court in the opinions appealed from has adopted some new and unheard of doctrine of granting punishment against a National Bank unheard of in the State practice, not applicable to State Banks or other lenders of moneys in the State of Florida. We have covered the technical phases of the Usury Statutes of Florida, and a casual examination of the provisions of Title 12, U.S.C., Section 86, will demonstrate that even under that statute the computation of penalties is exorbitant and clearly violative of the spirit and letter of that Federal Statute. Other phases, however, which are not so apparent on the surface, upon analysis have an effect that is even more shocking.

The National Bank, as demonstrated from this record, had had a long period of dealing with Constructors of Florida. In July, 1956, the National Bank had financed Constructors of Florida on the two mortgages which we have heretofore described. Chattel mortgages granting admitted first lien upon the equipment were given to secure that debt, as evidenced by the two mortgages. The contract with the City of West Palm Beach was not even in existence in July, 1956. The contract performance bond, wherein the American Surety Company bonded Constructors of Florida on the West Palm Beach Sewer Job, was dated August 29, 1956 (Tr.). This was well over one month after the chattel mortgages of July 24 and 25, 1956, respectively, had been executed and recorded in the Public Records of Dade County, Florida.

After that bond had been executed by the American Surety Company on behalf of Constructors of Florida, Constructors borrowed $60,000 in the first part of October, 1956, from the National Bank, and an agreement was worked out whereby the City of West Palm Beach, in order to secure the National Bank on that loan, agreed to send all the checks which would be due to Constructors of Florida, to the Coral Gables First National Bank. This was pursuant to a resolution of the board of directors of Constructors of Florida (Tr.).

In these prior transactions, running over a period of months, Pan American Bank of Miami was not a party in privity with Constructors of Florida or with the American Surety Company. We do not question that over a period of years these banks, as well as many other banks, had interchanged trust receipts or certificates in the nature of participation certificates, but these were matters solely controlled by contracts between the parties, that is to say, the banks involved, and these inter-company transactions

had nothing to do with the primary handling of these deals by the National Bank.

When the loan of November 14, 1956, the one now in question, was made, copies of these papers were all sent to the Surety Company. Their attorney-in-fact, Mr. Harold S. Flagg, with full knowledge of all the transactions, subordinated the claim of the Surety Company. The Surety Company at that time had no mortgage and had no type of assignment or contract from Constructors of Florida which could have in any way been deemed to have been prior to the mortgages held by the National Bank executed and recorded in July, 1956. Without, however, waiting for the consent of the Surety, or even the consent of the City of West Palm Beach, the National Bank in good faith made the loan of November 14, 1956, took the agreement of Constructors of Florida as to the assignment of the proceeds of the West Palm Beach contract, and advanced some $400,000, out of which the $60,000 loan was repaid.

The Coral Gables First National Bank did not attempt to participate the Pan American Bank until it had received the letter of November 27, 1956, from the Surety Company (Tr. 26-29). It continued to make payments out of Constructors of Florida Collateral Account No. 1 until over half of that account had been disbursed at the request of Constructors of Florida. When the final formal consent to the assignment was received on January 2, 1957, from the City of West Palm Beach, the balance of that account, totaling as we have before set forth, $135,597.62 over-all, was finally distributed by January 7, 1957.

On November 14, 1956, there was no certainty as to the time when payment of funds would be forthcoming from the City of West Palm Beach contract. Those checks

which were subsequently received prior to January 2, 1957, were represented by checks payable to Constructors of Florida and simply deposited with their knowledge and consent in their bank account, at the Coral Gables First National Bank, called Constructors of Florida, Inc., Collateral Account No. 2.

As we have heretofore pointed out, some substitution of collateral was permitted by agreement, and under the terms of the note and mortgage contract itself of November 14, 1956, Constructors had the right to substitute acceptable collateral in lieu of the cash payments coming in. The Bank could not have used that money. The title to that money was in Constructors of Florida, simply with a hold order requiring the approval of a bank officer before those funds could be converted to other collateral.

On March 4, 1957, when Constructors of Florida was in financial difficulty, not on the West Palm Beach job, but on other of its contracts, the President of that corporation, as we have heretofore pointed out, directed a letter in which for the first time they asked for a distribution of $50,000 from the funds on hand in the controlled account. At that time the National Bank still holding the first two mortgages of July, 1956, found that those mortgages were in default for failure to make the February payments, and the National Bank called the loan, as it had a right to do. It could have immediately foreclosed for the balance after the application of approximately $179,000.

The Surety Company, which was then involved under its commitments on other contracts, as well as commitments on the West Palm Beach contract, joined with Constructors of Florida in arranging a new program which would yield a possibility of some current funds for their operations. The American Surety Company could not

claim usury in the contract and did not at that time make any contention as to usury. Neither did Constructors of Florida. Under these circumstances, the contract of March 20, 1957, was renegotiated, in which the Surety Company, as well as Constructors of Florida, confirmed the prior position of the National Bank on all of its mortgages, being three in number.

The Appellate Court decision affirmed the findings of the Lower Court that while that contract had been made, it was void. This was the first time in Florida that any court has ever held that a contract itself was void because of a usury implication. Certainly the parties had a right to contract. Certainly the American Surety Company had a right to enter into that contract and confirm its inferior position. Certainly all the parties had a right to contract with reference to the handling of the proceeds from the West Palm Beach contract.

Whether that contract clarified the former alleged usury is not the question. The Florida Court voided the contract, which was a clear violation not only of the protection of the United States Constitution on the right of parties to contract, but the voiding of that contract in favor of the American Surety Company and its subordinating of its alleged lien protection, was the taking of a valuable property right of the National Bank and was the collateral infliction of an additional penalty for usury prohibited by the Federal Statute.

If the Florida Court had upheld the validity of the contract and simply held that the usury penalties of the State law would still be applicable to that contract, then we would have a different situation. The Florida Court was not content with doing that, but it voided the contract in its entirety, even though the original note of November

14, 1956, was cancelled and an entirely new note in the amount of $218,000 approximately was issued under different terms, different security arrangements and with different parties involved in the contract. That was a collateral penalty not authorized or permitted under the Federal Statutes or even under the State Statutes.

In addition to that forfeiture, and in addition to the complete cancellation of the National Bank's position as a first mortgagee under the notes and mortgages of July, 1956, the Appellate Court decision completely ignored the fact that the $135,597.62 represented by the funds which were originally deposited in Collateral Account No. 1 on November 14, 1956, had actually been paid to and used by Constructors of Florida. That money has been lost. It is obvious that the National Bank did not make available to or for the use and benefit of Constructors of Florida, $263,000. It actually, from its funds, gave to Constructors of Florida $400,000. If the Florida Court had given recognition to the fact that the principal amount of $400,000 had been given to Constructors of Florida instead of $263,000, then there would have been no usury in the contract of November 14, 1956, even under the admitted decision of the Appellate Court applying other Florida decisions.

What happened to the $135,597.62? The Appellate Court of Florida simply wiped that amount out of any consideration, and this is a clear-cut penalty violation in which the Florida Court must have forfeited that money also. How could the Florida Court forfeit $135,597.62, forfeit $110,000 worth of prime prior security on the two mortgages of July, 1956, and also void the contract of March 20, 1957, in relationship to the American Surety Company and its subordination? These are all penalties in the nature of equitable punishment against the National Bank which find no precedent in the Federal decisions or

in the State Court decisions. If the Florida Court in this computation had given consideration to that sum of $135,597.62, then there would have been no usury in the first place. How, then, can such a procedure be justified in the face of decisions of this Court and the clear mandates provided by the Federal Statute, 12 U.S.C.A. 86?

We have heretofore pointed out that under the Florida decisions of *Shorr* v. *Skafte*, Florida Supreme Court decision, 90 So.2d 604, *Clark* v. *Grey*, 132 So. 832 and *Carter* v. *Leon Loan & Finance Company*, 146 So. 664, the new contract under the Florida law was free of usury, if there had been any usury in the first place. The Lower Court had based its conclusion as to usury in the initial contract by recognizing that some $400,000 had been advanced by the National Bank in the first instance, but attempted to create a usury violation by the fact that the Bank had called the loan before its maturity date. In doing this, the Lower Court utterly ignored the contractual provisions contained in the note of November 14, 1956, which required, by contract, that the National Bank would refund or rebate or prorate any interest paid in advance in such event. So that there was never any contract by which the National Bank could have sued for or collected any usurious interest in the event of acceleration, nor was there any interest paid which was in violation of the Usury Statutes.

The higher court, District Court of Appeal of Florida, Third District, not basing its opinion on the same theory upon which the Lower Court opinion was based, simply ignored the fact that $400,000 had been paid by the National Bank, and reconverted the loan to $263,000. Then it held that since the State Bank by its subsequent trust participation had on or after November 28, 1956, paid to the National Bank $243,000, that they became the actual own-

ers of 93% of the total loan and that the National Bank only had 7%, or the difference between $243,000 and $263,000.

Again we ask, what happened to the $135,597.62? This sum cannot be found in the computation and final conclusions and orders of the Appellate Court. Not only is this a violation of the fundamental constitutional protection, but it is an additional penalty strictly in violation of the Federal Statute, Title 12, U.S.C.A. 86.

POINT 4.

May a State Court, in Addition to Allowing Interest Penalties and Forfeiture of the Amount of the Principal (All in Excess of the Original Amount of the Loan from the National Bank), Impose Additional Penalties by Way of Punitive or Exemplary Damages by Forfeiting Other Collateral Which the Bank Holds, Because It Is Claimed That the National Bank Came into a State Court of Equity Without Clean Hands?

In our arguments in support of Point 3, we have covered most of the issues presented in Point 4, with one exception. That lies in the fact that after the March 20, 1957, tri-party agreement in which the Surety Company had joined, the National Bank changed its position, waived its right to foreclose for then existing breaches in the first two mortgages, changed its distribution of the collateral to be received from the West Palm Beach contract, and operated under that new arrangement for approximately two months. In that two months period approximately $100,000 additional funds had been received from the City of West Palm Beach from March 20 up until the early part of June, 1957, and distribution had been made in accordance with the March 20, 1957, agreement.

Then the American Surety Company, Constructors of Florida and City of West Palm Beach, directly in violation of the conditions of the March 20, 1957, agreement, diverted all funds coming due from that contract, which funds would have been more than sufficient to have paid off and discharged the National Bank's claims against Constructors of Florida. The Surety Company was responsible for the completion of the West Palm Beach contracts. It had subordinated its position to that of the National Bank, and yet the Appellate Court, in voiding the agreement of March 20, 1957, held that the Bank's priority position, as far as the American Surety Company was concerned, was ineffective, and placed its stamp of approval upon the assignment or diversion of the Bank's trust fund securities from the West Palm Beach contract to the direct benefit of the American Surety Company.

The Appellate Court, in addition to all of the other penalties which had been inflicted upon the National Bank, as we have heretofore pointed out, in conflict with Title 12, U.S.C., Paragraph 86, approved the confiscation of valuable trust and security rights of the Bank.

So that as the opinion now stands, even though this Court would reverse the statutory usury penalties, as fixed by the Florida Appellate Court, and grant to the National Bank its full right to recover its principal of some $400,000, we find that Constructors of Florida is hopelessly insolvent, in bankruptcy, and there is no fund now in existence out of which the Bank could satisfy its claim. That is a further so-called equitable punishment which results in defrauding the National Bank and its depositors and stockholders, for the benefit of the American Surety Company.

That phase results in one of the most drastic penalties that could be conceived. The entire National Bank system

in the State of Florida would be wrecked, and the control by Congress of a National Bank under its protective statutes would be flaunted, ignored and reduced to absurdity. The Lower Court and the Appellate Court cited no authorities for such a drastic forfeiture, and there are no authorities in the State of Florida or within the realm of the decisions of this Court which support such a forfeiture.

POINT 5.

Where, After a Loan Has Been Consummated by a National Bank to a Corporation, and Where the Privity of Contract Is Solely Between the National Bank and the Corporate Borrower, and Where Several Weeks After the Loan Is Consummated the National Bank, Pursuant to Its General Banking Practice under the Federal Reserve System, Grants a Simple Trust Receipt or Participation for a Part of This Loan on a Straight Simple 5% Interest Participation, Does That Subsequent Transaction with the State Bank Relate the Whole Transaction from the Inception As a Co-Adventure or Joint Adventure or Agency Contract So As to Avoid the Direct Application of the Federal Statute on Usury, and Bring into Play the State Penalties Applicable Only to a State Bank?

This point necessarily involves some of the same factors discussed in the argument on the previous points. But in addition, it raises one specific point upon which we will comment. That is the effect upon the Federal Statute where a National Bank, after a loan has been consummated with a borrower, grants a trust certificate either to a State or Federal Bank, or even to some individual.

The National Bank in making this loan of November 14, 1956, was subject to the rules of the Federal Reserve

Act and the rules of the Comptroller of Currency under the National Banking Act. Under the rules of the National Banking Act reflected in Title 12, U.S.C.A., Sections 1 and 21, there was vested in the Comptroller of Currency the power to make rules and regulations. Under this authority, the Comptroller had issued his opinion #9530, which was in force and effect at the time this loan was made on November 14, 1956, in which it was provided as follows:

> "There is no legal prohibition against a national bank making a loan in periodic installments instead of in a single lump sum, although the latter is the usual practice. Likewise, it is not illegal to accomplish the same end by placing the entire amount of a loan in a special account out of which the borrower may make limited periodic withdrawals.
>
> However, under the latter arrangement the bank must be careful that the total charges imposed upon the borrower (whether such charges are described as 'interest,' 'service charges', or otherwise) do not exceed the legal rate of interest. * * *"

When the National Bank made this loan on November 14, 1956, it was acting solely and clearly within the purview of the Federal Banking Statutes and the Comptroller's rulings. Some $263,000 was immediately given to the credit of the borrower. Simultaneously, $135,597.62 was placed in the name of Constructors of Florida, Inc., the borrower. The title to the money was in the borrower, and there was simply a control provision for disbursement of that sum awaiting the receipt of the formal assignment documents. However, without waiting for this assignment document, which did not reach the Bank until January 2, 1957, the Bank had in good faith, at the request of the borrower, advanced approximately 50% of that amount, and on January 7, 1957, paid out the entire bal-

ance. Whether interest was charged by the Bank on those additional sums or not would make no difference in the usury computation. If the Bank had the right to charge interest on the funds in Collateral Account No. 1, interest computed over the life of the loan of two years was only 11.2%. If it would not be permitted to charge interest until all the funds had actually been paid out, then, taking into consideration that there were two installment payments made out of that account in November and December, 1956, and interest only computed from the date the money actually left the account, the Bank would have charged unauthorized interest amounting to less than one-half of 1% on the over-all loan.

So, whether the interest charged was 11.2% or 12%, or some figure in between, would have no bearing upon the question of usury, since the Florida Usury Statute permitted an over-all interest charge against a corporation loan of 15% per annum.

Participations, either whole or in part, are a standard practice of all members of the Federal Reserve System. These participations are in the nature of a re-discount, totally or partially, except that the holder of the participation certificate does not take any legal title to the securities or to the basic note. They may be dealt with by private contract on such terms and conditions as the two contracting Banks may agree upon. The only provision under the Federal Law and the Comptroller of Currency Rulings is that contained in Ruling or Regulation 1135A. We copy this in full at this point for the convenience of the Court.

"1135A. Sale of loan participations to other banks on a 'last in-first out' basis

The sale of a participation in a loan to another bank (usually the sale of the 'overline' or legally ex-

cessive portion of a loan) under an arrangement whereby the placed portion of the debt must first be extinguished subordinates the interest of the selling bank. It is unsound to place the selling bank in a position whereby any loss that may occur on the entire loan up to the amount of the selling bank's participation must be borne by it, and in 'overline' participations the intent and purpose of R.S. 5200 would be nullified under an agreement having this effect. To avoid this possibility, participation arrangements giving to one of the participating banks an earlier maturity or preference with respect to payment of the obligation(s) in the regular course of business, should provide that in the event of default (interest and/or principal payments past due and unpaid for such period as the participants may by agreement determine) on the loan, the appointment of a receiver, or bankruptcy of the borrower, the participating banks shall share in all subsequent loan payments and collections, in proportion to the percentage of participation held by each bank at the time of the default, the appointment of a receiver, or bankruptcy. With respect to participations in real estate loans see Paragraph 2715."

It can be seen from the application of this ruling that the so-called participant, who has taken the overline or legally excessive portion of the loan, does not have any legal title to the original note or the security pledged therefor, but that under this regulation, until a default occurs, the Banks are free to deal among themselves without regard to the maker of the original note held by the National Bank. The regulation simply provides that where the payments are past due and unpaid, or where there is an appointment of a receiver or a bankruptcy of the borrower, the participating Banks shall share in all subsequent loan payments and collections in proportion to the percentage of participation held by each Bank at the time

of the default, the appointment of a receiver or bankruptcy.

It was because of this one provision of the National Banking Law and Comptroller's Rulings that the Pan American Bank of Miami, a State Bank, was even made a proper party to the foreclosure action. It had no privity of contract with Constructors of Florida, City of West Palm Beach or the American Surety Company.

The State Court in its opinion has created an entirely new concept of the legal position of a subsequent participant with a National Bank. It finds no foundation in any reported decisions and is in dead conflict with the Federal Statutes and the Rulings of the Comptroller of Currency. The agreement of Pan American Bank in its participation was not on the terms of sharing pro rata in the deal or contract with the National Bank. It was not a party to the original contract. It never could share in any of the interest accumulations or contracts of the National Bank with the borrower. It could never hope to recover more than $243,000, plus interest at 5%. There was no provision whereby any of the interest to be received from Constructors of Florida was ever to be transferred on a pro rata basis, nor was there any agreement in that participation certificate whereby the National Bank ever legally assigned or even equitably assigned any of the direct payments made by Constructors of Florida or the City of West Palm Beach. No part of that collateral consisting of funds from the City of West Palm Beach or the second lien on the equipment, was ever assigned to the Pan American Bank. There was no agency and not one iota of testimony produced in this record to show any antitipatory agreements or understandings between the Pan American Bank, as a State Bank, and the Coral Gables First National Bank, on No-

vember 14, 1956, at the time the loan was consummated between the National Bank and the borrower.

These two Banks were free to deal with themselves and between themselves. The Coral Gables First National Bank under the Federal Regulations could have participated the balance of the 45% to other banks, either State or National, have paid those participants whatever interest it agreed to pay, and could have kept the benefit of any overage interest. That was a matter with which the maker of the note had no concern. It is a standard line of banking practice, and to apply the rule of equitable penalties, equitable damages, such as applied by the Appellate Court of Florida in this case would shatter the method of doing business under the Federal Banking System.

The ruling, therefore, of the Appellate Court of Florida, under the doctrine of usury, not only shatters the concept of Title 12, U.S.C.A., Paragraph 86, but shatters and holds to be null and void the acts of a National Bank when it is acting solely and well within the purview and directions of the Comptroller of Currency who was in charge of the operation of National Banks. If the actions of the National Bank were in full accordance with the rules and regulations governing National Banks or State Banks which were under the Federal Reserve System, then it is no concern of the State of Florida and its Courts, to hold for naught and to void or to place extraneous constructions upon the control factors of the National Banks.

The Appellate Court of Florida in its opinion (119 So.2d 747, first column) referred to subsequent cases collected at 12 U.S.C.A. 343. The only case referred to under that heading is *Federal Reserve Bank of Richmond, Va.*, v. *Duffy et al.*, 188 S.E. 82, 210 North Carolina 598. The case does not support the statements made by the Ap-

pellate Court in its opinion, but the effect of the case is to hold just to the contrary.

In this case there was an action brought by the Federal Reserve Bank of Richmond, Virginia, in the State Court of North Carolina. F. S. Duffy had executed a note payable to the First National Bank of New Bern, North Carolina, and that bank thereafter transferred the note by endorsement to the Federal Reserve Bank of Richmond. This note was secured by a mortgage on real estate. The note was dated September 12, 1929, and was assigned for discount to the Federal Reserve Bank of Richmond on September 14, 1929. The credit was extended from the Federal Reserve Bank to the New Bern Bank as of the date September 14, 1929. About six weeks later, on October 26, 1929, the First National Bank of New Bern closed its doors. The makers of the note above referred to had on deposit with that bank certain sums which they claimed they had a right to set off against any indebtedness due to the bank, including the indebtedness represented by the note of September 12, 1929, which had been assigned and discounted to the Federal Reserve Bank.

The Federal Reserve Bank then brought suit, and the defendants contended that the Federal Reserve Bank acted in bad faith when it took this note for discount. They contended that the note was ineligible for discount, and that therefore the Federal Reserve Bank, the plaintiff, was not entitled to the position of a holder in due course so as to deprive the defendants of the right of set-off to the amount of their deposit in the closed bank.

The Supreme Court of North Carolina held that even if the plaintiff had accepted for discount paper declared illegal by the act or by the rules under federal procedure, the defendant who owed the debt could not complain. They relied upon a decision by Circuit Judge Parker in *Lucas* v.

Federal Reserve Bank, 59 F.2d 617, 620. In this case, which was quoted in detail in the opinion of the North Carolina Court, the fundamental rule was laid down that the exercise of powers or incidental powers under the Federal Reserve Act was solely a matter for federal determination, and held that even though there were technical rules in the discounting of paper that might have caused the Comptroller of Currency or the Federal Banking Examiners to question the validity of the transaction, yet the borrower had no position to question it, stating (p. 84, column 2):

> "It is equally clear that whatever the power of the Federal Reserve Bank with respect to taking as collateral paper not eligible for discount, no one can complain of such action except the government, the sovereign which created and limited its powers. * * *"

Then the Court said:

> "Defendants contend further that the relationship between the Federal Reserve Bank of Richmond, Va., and member banks was such as to constitute the latter the agent of the former, and thus impute notice to the principal of all facts known to the member bank. * * *"

But the Supreme Court of North Carolina rejected that doctrine, stating:

> "Where the agent is dealing in his own behalf, or has personal interest to serve, the knowledge of agent is not imputable to the principal. * * *
>
> Here the First National Bank of New Bern, seeking to secure additional funds to continue a failing business, negotiates a valid paper, which, on its face, is entirely proper and eligible for discount by the plaintiff, but fails to disclose facts which might have prevented its discount, and thereby obtains advances from the plaintiff for its own purposes. The New Bern bank was acting in its own interest, adversely to the plaintiff, in selling to the plaintiff the New Bern bank's

property, and hence knowledge of bad faith, if any, on its part cannot in law be imputed to the Federal Reserve Bank."

Applying that principle of law expressed in said opinion and supported by Federal authorities, how could it be said that the Pan American Bank of Miami had constituted The Coral Gables First National Bank its agent, when it did not even come into the loan transaction until two weeks after the National Bank had already consummated the loan and had made advances of $400,000 in principal sum to the borrower. The State Bank had nothing to do with the original loan and nothing to do with the securing of the collateral, and had nothing to do with the interest rate fixed between the borrower and the National Bank. How could that subsequent transaction relate back to establish the two essential points found by the State Court—

1. That the subsequent participation of the State Bank by a retroactive measure constituted the National Bank its agent, or

2. How could that subsequent participation create a relationship where the National Bank was used as a subterfuge or as a conduit by which the State Bank sought to lend its money at a usurious rate of interest under the guise of protection of the National Bank, and Title 12, U.S.C.A., Paragraph 86.

These are simply imaginary and fictitious conclusions drawn by the Appellate Court of Florida, not based upon any facts, but asserted as a flimsy and unsupported foundation for assessing collateral punitive damages against the National Bank.

While not definitely pointed out, there seems to be a trend running through the theory of both the lower court

and the Appellate Court of Florida that if The Coral Gables First National Bank, as a National Bank, had handled this deal by itself, then the Federal Act would apply. However, it seems to be intimated, if not actually held, that where the National Bank, after the loan was made, subsequently participated some of that loan, as it had a right to do, to any member of the Federal Reserve System, and the actual participation was made to a Florida State Bank, that then the National Bank lost all of its rights or protection, as it may be called, under the Federal Statute.

A very similar case, at least similar in principle, has been decided by this Court since the filing of the petition in this cause. On December 5, 1960, which was several days after this petition was filed, this Court rendered its opinion in the case of *Small Business Administration, Petitioner* v. *G. M. McClellan, Trustee,* 81 S. Ct. 191 (Supreme Court Rep. Advance Sheet, December 15, 1960). In this case, the Supreme Court of the United States reversed the decision of the United States Court of Appeals for the Tenth Circuit (272 F.2d 143).

Referring to the facts set forth in the Court of Appeals opinion, it appears that one Byquist had made an application on a Small Business Administration form, entitled "Limited Loan Participation Application for Loan", to the Brookville State Bank of Brookville, Kansas, for a $20,000 loan. On October 30, 1956, the Bank endorsed the application to show that it was willing to make the loan upon the participation of SBA therein to the extent of 75%. On November 19, 1956, SBA agreed and entered into a participation agreement with the Bank. It was agreed that upon request by the Bank, SBA would purchase a 75% interest; that the Bank would hold the note and on 5 days written demand would transfer it to SBA; that the holder of the note, whoever it might be, would service it and re-

mit promptly to the other party its pro rata share. SBA and the Bank were to bear any loss incurred ratably according to their respective interests in the loan.

On November 21, 1956, SBA sent the Bank its check in the amount of $15,000 for the sole purpose of purchasing a 75% interest in the loan. The State Bank then loaned $20,000 to Byquist who executed and delivered a note payable to the Bank. This loan was on the form authorized by SBA.

On September 5, 1957, Byquist was adjudicated a bankrupt and subsequent to the date of bankruptcy the Bank assigned the note to SBA. SBA then filed its claim on October 15, 1957, for the entire unpaid balance on the note in the sum of $16,788.42, and claimed priority therefor.

The Referee and the United States District Court, as well as the United States Court of Appeals, Tenth Circuit, held that the State Bank was the primary creditor, and that the United States in its participation through SBA was only a beneficial owner of a part of the debt. The opinion of the United States Court of Appeals, Tenth Circuit, pointed out (p. 145) that the United States, through SBA, was bound by its written contract to account to the State Bank for 25% of any collections made under the note, and that therefore the Bank would share to that extent in any proceeds resulting from the award of a priority to the United States. That Court pointed out that no such priority to a private creditor is provided for. That Court ended its opinion as follows (146):

> "The United States has engaged in a commercial enterprise and made no effort to safeguard its rights under §3466. In a contract made on its own forms it has agreed to share ratably proceeds and losses. It may not assert a priority which will produce a re-

covery that by contract must be divided with a private entity."

However, the Supreme Court of the United States reversed that decision, and the question was squarely put in the opinion by Mr. Justice Black (83 S. Ct. 193):

> "The basic question this case presents is whether, when the Administration has joined a private bank in a loan and the borrower becomes a bankrupt, the Administration's interest in the unpaid balance of the loan is entitled to the priority provided for 'debts due to the United States' in R.S. §3466 and §64 of the Bankruptcy Act, even though the Administration has agreed to share any money collected on the loan with the private bank."

The Court in its opinion pointed out that the District Court had concluded that since the bankrupt's note evidencing the loan was not assigned by the Bank to the Administration until after the commencement of the bankruptcy proceedings, the debt was not entitled to priority. Then the Court in its opinion pointed out that the Court of Appeals upheld that general order, holding that the Administration having contracted to pay to the participating private bank one-fourth of any distribution received, it could not assert its priority and thus have a private party benefit from the priority. But this Court overruled those contentions and said that where the debt was sought to be collected by a Federal Agency, the fact that the Administration had contracted to pay to the participating private bank one-fourth of any money it later collects on the loan, does not mean that the Government must lose its priority, the Court stating (195):

> "Respondent's argument to the contrary seems to rest upon the assumption that the Government is deprived of its priority by making a contract to pay a

part of its funds to another creditor of the bankrupt who has no priority."

Then, further, this Court said (196):

"The purpose of these sections is simply to protect the interest of the Government in collecting money due to it. Once that money is collected and placed in the Government Treasury, the end sought to be achieved by §3466 and §64 of the Bankruptcy Act is completely satisfied. At that point, there is no difference between the money so received and money received from any other source and, like other money, it may be disbursed in any way the Government sees fit, including the satisfaction of obligations already incurred, so long as the purpose is lawful. The Small Business Administration is authorized to enter into contracts calculated to induce private banks to make loans to small businesses. The contract involved in this case, by providing additional security to the private bank at the Government's expense, is well adapted to that end. Indeed, in many cases such a contract may be the only way the Administration could induce private bank participation in a necessary loan. In those cases, acceptance of respondent's argument would make it more difficult for the Administration to perform its statutory duties. Clearly Congress did not intend, by the very act of imposing duties upon the Administration, to take away a privilege necessary to the effective performance of those duties.

* * * Respondent's argument from the policy of equality of distribution for similar creditors expressed in the Bankruptcy Act is no more convincing. It is true that the allowance of the priority asserted here will place the bank, a private unsecured creditor, in a better position than other private unsecured creditors. But this position is a result, not of any inequality of distribution on the part of the bankruptcy court, but of the bank's valid contract with the Small Business Administration."

Applying the theory of that case to the situation now at hand, we find that the position of a National Bank under Sections 85 and 86 of Title 12, U.S.C.A., is stronger than the facts presented in the *Small Business Administration* case. Here the National Bank made the initial loan. It expended out of the National Bank's assets $400,000 approximately for advances on the $442,400 loan. At that point the National Bank was the only party in privity with Constructors of Florida, Inc., the borrower. The note was in its name and the security pledged was in the name of the National Bank. It was then no concern of the borrower what disposition the National Bank made of that loan. It could have assigned that loan either to a National Bank or any other member of the Federal Reserve. It could have sold it outright to third parties or it could hold the note and grant participations which were allowed under the Federal Reserve Act to either State or Federal Banks in whole or in part under the doctrine of participations. It had the right to make any terms as to the participation and interest return that it saw fit. This did not render any of the holders of the participation certificates in privity with the original borrower.

Admittedly, some two weeks after the loan had been consummated, on November 14th, a State Bank, also a member of the Federal Reserve System, took a participation for 55%, but at a restricted 5% interest agreement. This was a matter solely between the National Bank as the holder of the note and the collateral, and its participant. This did not amount to an assignment of the loan or any transfer of any legal title to the note or to the security. Whatever protection the National Bank had at the time the loan was consummated on November 14th, 1956, was not lost or waived by the National Bank. When the National Bank, pursuant to the terms of its note con-

tract, called this loan, it was acting pursuant to its contractual rights, and the State Bank had nothing to say about the action which the National Bank took. The State Bank was not even a party to the so-called renegotiated loan or the new loan of March 20, 1957. The State Bank did take a small participation in that loan, but that was by separate contract. After Constructors of Florida, Inc., became insolvent and the foreclosure was instituted by the National Bank in the fall of 1957, the National Bank was the primary plaintiff in that foreclosure. The only reason the State Bank was required to be joined as a proper, but not a necessary, party plaintiff was because of the rulings of the Comptroller of Currency, Ruling 1135A, which in simple and concise language, as we interpret it, provides that where there are defaults of interest or principal payments under the loan which is held by the National Bank, then the participating banks shall share in all subsequent loan payments and collections in proportion to the percentage of participation held by each bank at the time of the default, the appointment of a receiver or bankruptcy. This rule applied to loans secured by personal property as distinct from real estate loans.

Applying these same principles as laid down by this Court in the *Small Business Administration* case, *supra*, the total claim of the Coral Gables First National Bank came squarely under the provisions of Sections 85 and 86 of Title 12, U.S.C.A. The opinion of the Courts of Florida attempting to strip the National Bank of its protection is clearly violative of the Federal law.

CONCLUSION.

In a preliminary part of this petition for certiorari we emphasized that we were submitting this question to the Supreme Court of the United States solely on the point that, assuming but not admitting that usury was found to have been exacted by the National Bank by the State Court decision, and that approximately $11,000 of interest was paid by Constructors to the Coral Gables First National Bank, did the Federal Statute, Title 12, U.S.C.A., Par. 86, restrict the penalty of recovery against the National Bank to twice the amount of the interest actually paid, which would have approximated $22,000?

If that is the limit of the penalty, then the National Bank was entitled to recover approximately $110,000 of principal, which was the balance due on the undisputed mortgages of July, 1956, plus interest and attorneys' fees. The National Bank would be entitled to recover approximately $151,000, which was the balance of the principal due on the re-negotiated mortgage note of November 14, 1956, as revised by the note of March 20, 1957, plus attorneys' fees, less the credit of approximately $22,000, which is double the amount of the interest actually paid by Constructors of Florida to the Coral Gables First National Bank.

If this Court holds that the Federal Statute limits the penalties to that amount since the title to all of the mortgages and notes was in the Coral Gables First National Bank, then the Coral Gables First National Bank could recover, and the Pan American Bank of Miami as the participant would then have its percentage of the participation.

In this event that part of the decrees and opinions of the Florida Courts extinguishing the lien and priority of the National Bank's mortgages as a penalty for coming into equity with unclean hands, would be automatically avoided. Thus also would be avoided the affirmative judgment against the Pan American Bank which was not even in privity with Constructors of Florida, and the offset judgment against the National Bank would be reduced from some $74,000 down to approximately $22,000.

Respectfully submitted,

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APPENDIX

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

IN CHANCERY No. 205613-E.
(Judge Crawford.)

THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc.,
Plaintiffs,

vs.

CONSTRUCTORS OF FLORIDA, INC., et al.,
Defendants.

PARTIAL FINAL DECREE.

THIS CAUSE coming on to be tried before the Court and The Coral Gables First National Bank, the Pan American Bank of Miami, Constructors of Florida, Inc., City of West Palm Beach, American Surety Company of New York, Richard R. Reynolds, James M. Lancaster, Jr., Earl L. Goodwin, Russell A. Ortmayer, Harold S. Flagg and Tom Maxey having presented their testimony together with that of their witnesses and presented the documentary exhibits to be considered by the Court, and after consideration of the matter, the briefs of counsel, the Court

FINDS:

On September 20, 1957, the Coral Gables First National Bank, and the Pan American Bank of Miami, as Plaintiffs, filed their Bill of Complaint against Construc-

tors of Florida, Inc., City of West Palm Beach, American Surety Company of New York, Richard R. Reynolds, Jim M. Lancaster, Jr., Earl L. Goodwin, Island Construction Company, Pecon Construction Company, J. C. Bledsoe, Russell A. Ortmayer, Harold S. Flagg, Tom Maxey, and the United States of America, as Defendants, seeking to foreclose three (3) chattel mortgages, in the amount of $13,888.95, $92,690.85 and $151,802.46, and to impose liability for any deficiency on American Surety Company of New York and the City of West Palm Beach.

All defendants who were served with process filed their answers denying liability; and, in addition, setting up counterclaims against the Banks.

Constructors of Florida, Inc. and Messrs. Reynolds, Lancaster, Goodwin, by their counterclaim, alleged that the larger of the three (3) loans sought to be foreclosed, in the original principal amount of $442,400.00 was in fact usurious; that the Banks breached their contract to loan money to Constructors of Florida, Inc. by withholding from Constructors of Florida, Inc. the major portion of the proceeds of said larger loan; and that by said breach the Banks impaired the working capital of Constructors of Florida, Inc., thus ruining Constructors of Florida, Inc. and causing substantial damages; moreover, that the Banks, as a part of their conspiracy and scheme to collect usurious interest, caused Messrs. Reynolds, Lancaster, and Goodwin to decline a bona fide offer to purchase forty (40%) percent of the stock of Constructors of Florida, Inc. for the sum of $400,000.00, all to the damage of Constructors of Florida, Inc., and its principals, in the amount of $3,674,480.76 as to the corporation, and $2,342,379.19 as to its principals.

American Surety Company of New York, in addition to adopting the allegations of the counterclaim filed by

Constructors of Florida, Inc., and its principals, also by its counterclaim, alleged fraud and deceit on the part of the Banks, in that the Banks gave to American Surety Company of New York false and fraudulent information concerning the financial condition of Constructors of Florida, Inc., which information American Surety Company of New York believed and acted upon, thus causing American Surety Company of New York to refrain from taking action to prevent losses on its then outstanding bonds, and, further causing American Surety Company of New York to write additional bonds on the strength of the credit and quick assets of Constructors of Florida, Inc., all to the damage of American Surety Company of New York in the amount of $1,367,379.19.

The City of West Palm Beach, in its counterclaim, adopted the factual allegations of the counterclaims filed by the other defendants and counterclaimants, and alleged that the actions of the Banks were the direct and proximate cause of the City's being forced to take over the contracts held by Constructors of Florida, Inc. with the City of West Palm Beach, all to the damage of the City of West Palm Beach in the amount of $279,423.58.

John Nicholas, as Receiver in Bankruptcy of Constructors of Florida, Inc. was allowed to intervene by the Court and filed his answer and counterclaim against the Plaintiffs and adopted the pleadings, answer and counterclaim filed in the cause on behalf of Constructors of Florida, Inc. together with answer and counterclaim directed against the other Defendants.

Pecon Construction Company and J. C. Bledsoe were never served with process.

The trial of the first phase of the suit was limited to the "primary" issues between the principal parties.

Constructors of Florida, Inc., a Florida corporation was organized in 1955 with Richard R. Reynolds, Jim M. Lancaster, Jr. and Earl L. Goodwin as principals. The Corporation was very busy and in October 1956 it was engaged in the completion of some eighteen (18) municipal, state and federal governmental contracts throughout the State of Florida, having a total value of about $3,800,000.00. The Corporation needed a large amount of working capital. In negotiations between the Corporation and The Coral Gables First National Bank, a loan was entered into on November 14, 1956, in the principal amount of $442,400.00, repayable at $3,000.00 per month principal, plus interest at 5% per annum for twenty-three (23) months with a balloon or final payment on the twenty-fourth month of $373,400.00, plus interest at 5% per annum. This loan was secured by chattel mortgage on all motors and equipment of the Corporation and by "assignment" of payments due from the City of West Palm Beach to the Corporation on sewer contracts 7 and 9. At that time the Corporation was indebted to The Coral Gables First National Bank on account of the remaining principal balance of two equipment payment consolidating loans made in July 1956, in the amounts of $19,444.53 and $129,767.19 or a total of $149,211.72. Preliminary to the large loan of November 14, 1956, the Banks also granted a $60,000.00 interim loan to the Corporation on October 5, 1956. This interim loan was secured by a corporate resolution directing the City of West Palm Beach to mail checks payable to Constructors of Florida, Inc. for work done on contracts 7 and 9 to The Coral Gables First National Bank. This resolution plus agreement to so mail said checks by the City of West Palm Beach constituted the "assignment" referred to above.

The Coral Gables First National Bank in making the loan of $442,400.00 actually paid to Constructors of Florida, Inc. $202,562.38, since they paid to themselves from the

proceeds of the loan the existing $60,000.00 indebtedness of the Corporation. In addition, the Banks deducted $44,240.00 as a commitment fee and $44,854.44 as discount or interest paid in advance. Furthermore $90,743.18 was deposited in a new account called "Collateral Account No. 1" which was a controlled account requiring the signature of a Vice-President of the Banks and an officer of Constructors of Florida, Inc. Upon the Corporation's asking the Banks for an explanation of these charges, it was explained that there was an error in making the commitment fee charge of $44,854.44 and that this amount would be paid into Collateral Account No. 1. This was done increasing this account to a total balance of $135,597.62. The Banks further stated that the charge of $44,240.00 would be treated as pre-paid interest, i. e., 5% per year for two years or a total of 10%. The face of the $442,400.00 note provided only for interest at the rate of 5% per annum, payable monthly for twenty-three months with the small $3,000.00 per month principal payment with the balance of interest and principal due on the twenty-fourth month. The discount interest charge was in addition to the interest rate shown on the face of the note.

The Coral Gables First National Bank also created "Collateral Account No. 2" which was a controlled account requiring the joint signature of an officer of the Banks and of the Corporation, and into this account was paid on November 29, 1956, $36,488.11; December 24, 1956, $42,750.32; January 24, 1957, $53,247.39; February 26, 1957, $24,168.04; and on March 1, 1957, $37,502.25, making a total of $194,156.11, all as payments made to Constructors of Florida, Inc., by the City of West Palm Beach. The understood terms of the loan at the time of its making did not contemplate such controlled accounts and there was no such provisions set forth in any contract documents.

During the months of December 1956 and January 1957, the affairs of Constructors of Florida, Inc. appeared to progress well. From time to time, the Corporation called upon the Banks to release to their use certain of the funds held by the Banks in Collateral Account No. 1.

These requests were granted and the entire amount originally withheld in Collateral Account No. 1 was paid over to Constructors of Florida, Inc. by January 7, 1957. During the time of these advances from Collateral Account No. 1, the Banks had received and deposited in Collateral Account No. 2, the sum of $122,749.34, and by the end of February 1957, a net balance of $179,540.67; the Banks receiving in Collateral Account No. 2 more money than disbursed from Collateral Account No. 1. About this time the Corporation requested the Banks to advance $100,000.00 of the amount held in Collateral Account No. 2, which the Banks claimed was being held as additional security and which the Corporation thought was capital available for its use. Through continuous negotiations between the Corporation and the Banks, the request was reduced to $50,000.00 and indications were made by the Banks that it would be granted. On March 4, 1957, an officer of the Corporation left a signed check, in blank and undated, with the Banks so that funds in the amount of $50,000.00 could be deposited in the corporate account and withdrawn by the Corporation on the following day. The Banks, however, completed the check for the total amount remaining in Collateral Account No. 2 of $179,540.67 and without the knowledge or consent of the Corporation applied the same to the reduction of the face amount of the $442,400.00 loan. The Banks had, up to this time, apparently thought that the Corporation loans were secured by guarantee of the American Surety Company of New York and on March 4, 1957, realized that this was not true in fact.

When the $442,400.00 loan was made, it was beyond the legal lending limits of The Coral Gables First National Bank.

As of November 14, 1956, Constructors of Florida, Inc. was indebted to Coral Gables First National Bank in the amounts of $19,444.53 and $129,767.19, the unpaid balance then due on the equipment notes dated July of 1956, and in the amount of $60,000.00 on the interim loan. $202,562.38 was actually paid to Constructors of Florida, Inc. on account of the $442,400.00 loan of November 14, 1956, so that the actual net cash which had been paid over to Constructors of Florida, Inc. by Coral Gables First National Bank, as of November 14, 1956, was $411,774.10. However, Pan American Bank of Miami, as participant in each of these three (3) loans, was debited by Coral Gables First National Bank with the sum of $19,444.53, $129,767.19, and $243,320.00, or a total of $392,531.72. Actually, therefore, Coral Gables First National Bank was merely a conduit, and agent; the new loan of $442,400.00 did not, according to the books and records of Coral Gables First National Bank, increase the net amount of the indebtedness of Constructors of Florida, Inc.; rather the net amount of indebtedness to Coral Gables First National Bank, after the new loan of $442,400.00, actually decreased from $209,211.62 to $19,242.38, a net decrease of $188,969.24. In other words, immediately prior to the consummation of the alleged $442,400.00 loan on November 14, 1956, Constructors of Florida, Inc. was indebted to Coral Gables First National Bank in the amount of $209,211.62; immediately after the consummation of the alleged $442,400.00 loan, Constructors of Florida, Inc. was indebted to Coral Gables First National Bank only in the small amount of $19,242.38. By loaning $393,531.72 of the money of Pan American Bank of Miami, Coral Gables First National Bank decreased its outstanding loans by $188,969.24.

In early March of 1957, Constructors of Florida, Inc. was in financial difficulty finding itself unable to meet the current payroll. After The Coral Gables First National Bank had applied $179,540.67, the balance of Collateral Account No. 2, to the payment of the outstanding loan, a meeting was held by the officials of The Coral Gables First National Bank, Pan American Bank of Miami, Constructors of Florida, Inc. and American Surety Company of New York. Mr. Eduardo Morales of Pan American Bank, Mr. Riley and Mr. McGoogan of The Coral Gables First National Bank, Messrs. Reynolds, Lancaster and Goodwin for the Corporation and Mr. Harold S. Flagg for the Surety Company participated in a general discussion of the financial position of the various parties at that time. It was then agreed that out of the remaining amounts to be collected on the City of West Palm Beach sewer contracts 7 and 9, approximately 65% thereof would go to retire the indebtedness to the Banks and approximately 35% thereof would be deposited into a controlled trust account to be used by Constructors of Florida, Inc. The loan repayment agreement of March 20, 1957 was executed together with the renewal contract note of that date in the amount of $218,275.25 providing for a straight 15% interest per annum. A usury release was executed together with personal guarantees by the three officers of Constructors of Florida, Inc. These documents were executed under compulsion and force of the precarious financial circumstances then existing due to the wrongful manner in which the loan accounts had been handled by the Plaintiff-Banks, are void and without consideration.

The Corporation never recovered from this point on and shortly thereafter complete default occurred on contracts and corporate business.

The Plaintiff-Banks, on account of the loan of $442,400.00 of November 14, 1956, had actually charged Con-

structors of Florida, Inc., total interest in the amount of $49,855.44, which is fifty-six and 27/100ths (56.27%) percent per annum on the actual moneys disbursed to Constructors of Florida, Inc. on account of said loan, based on a 365 day year, or fifty-five and 5/10ths (55.5%) percent per annum based on a 360 day year.

The total interest reserved on the face of the note, when added to the $44,240.00 retained by the Banks as interest taken in advance, discount, or commitment fee, amounted to a total of $85,029.92 actually reserved, charged, or taken by the Banks.

The transfer of $135,597.62 by the Banks on November 14, 1956 to Collateral Account No. 1, a controlled account requiring the signature of an officer of the Banks, was not a payment to the account of the Corporation for which interest could be charged. Title to the funds did not belong to the Corporation until delivered to them free of control.

The payments by the City of West Palm Beach in periodical installments between November 29, 1956 and March 1, 1957 of $194,156.11 into Collateral Account No. 2, a controlled account requiring the signature of an officer of the Banks, did amount to payments to the Banks of cash collateral requiring a rebate of interest charged on like amounts outstanding.

It appears that under any lawful and reasonable contention the Banks charged Constructors of Florida, Inc. at least thirty-eight and 40 100ths (38.40%) percent interest on the $442,400.00 loan and fifty-six and 27/100ths (56.27%) percent if you use only the actual amount of the said loan which was made available to the uncontrolled account of Constructors of Florida, Inc. It seems without question

that the interest charged and reserved exceeds twenty-five (25%) percent per annum.

It therefore follows that under Sec. 687.04 and 687.07, Florida Statutes 1957 the notes and mortgages sued upon by the Plaintiff-Banks are void and of no force and effect.

The Plaintiff-Banks are liable to Constructors of Florida, Inc. as follows:

(a) For double the amount of discount, commitment fee or interest paid in advance, in the amount of $44,240.00			$88,480.00
(b) For double the interest reserved on the face of the note, in the amount of $40,789.92, as shown by Schedule 2, Column 1 of Pentland, Purvis, Keller & Co. audit, Plaintiffs' Exhibit No. 47			81,479.84
(c) For cancellation of the principal amount allegedly remaining due thereon			151,802.46
(d) For recovery of all amounts previously paid thereon, as follows:			
Amount of note	$442,400.00		
Less balance	151,802.46		
Principal paid		$290,597.54	
Interest paid per Schedule 1, Plaintiffs' Exhibit No. 47		14,271.38	
Total previous paid			$304,868.92
Total Usury Damages			$626,731.22

Inasmuch as the Plaintiffs were joint adventurers, and agent and principal each for the other, each is liable for the total amount of such damage, and the Federal Banking Code has no application to prevent imposition of the statutes of the State of Florida as to usury penalties.

At the time the Banks wrongfully applied the balance of $179,540.67 remaining in Collateral Account No. 2 to the reduction of the face amount due of the $442,400.00

loan, neither of the notes of July 25, 1956 and July 24, 1956 held by the Banks and secured by chattel equipment mortgages, were due or in default. The action of the Banks helped bring about the subsequent defaults in these loans and the amount seized by the Banks from Collateral Account No. 2 was more than enough to pay said loans in full or keep them current and in good standing. The debts are still due on said notes by the Corporation to the Banks in the amounts of $14,326.77 and $95,636.77 principal and interest included to May 1, 1958, respectively, but the notes and mortgages are not in default and not subject to foreclosure in this action. They may be paid in accordance with their respective terms with principal payments held to be in abeyance from time of alleged default to time of the entry of complete Final Decree in this case. The lien of the mortgages securing said debts are unenforceable as the Banks are not in equity with clean hands. The lien of the City of West Palm Beach and American Surety Company of New York against such chattel and equipment of the Corporation are superior to any claims of the Banks asserted in this proceeding.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiff-Counter-Defendant Banks are solely responsible or liable for all damages suffered by Constructors of Florida, Inc., resulting from the collapse of its business and forfeiture of its contracts.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiff-Counter-Defendants Banks are solely responsible or liable for all damages suffered by Richard R. Reynolds, Jim M. Lancaster, Jr. and Earl L. Goodwin resulting from the loss of value of the stock of Constructors of Florida, Inc., loss

of profits, or liability on personal guarantees other than those given to said Banks.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiffs-Counter-Defendants Banks are solely responsible or liable for all damages suffered by the City of West Palm Beach in connection with the completion of sewer contracts 7 and 9.

The evidence does show that the City of West Palm Beach did not agree in any way to guarantee any part of the loan made by the Banks to Constructors of Florida, Inc. There is no basis whatever for any equitable subrogation in favor of the Banks and against the City of West Palm Beach.

The evidence does show that the City of West Palm Beach is protected in the amounts expended to complete sewer contracts 7 and 9 by bonds written by the American Surety Company of New York. As secondary security, in case the American Surety Company of New York did not make good on said bonds, the City of West Palm Beach has an equitable lien, superior in right and dignity to any other lien or mortgages held by the Banks herein (except that of American Surety Company of New York after having made good on said bonds) covering all machinery and equipment of Constructors of Florida, Inc. located at West Palm Beach as of August 26, 1957.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiff-Counter-Defendant Banks are solely responsible or liable for all damages suffered by the American Surety Company of New York on account of the various bonds written and continued for Constructors of Florida, Inc., and Island Construction Co.

The evidence does show that the American Surety Company of New York did not agree in any way to guarantee any part of the loans made by the Banks to Constructors of Florida, Inc. There is no basis whatever for any equitable subrogation in favor of the Banks and against American Surety Company of New York.

The evidence further shows that Constructors of Florida, Inc. are indebted to American Surety Company of New York in the amount of $1,367,379.19 on account of the various bonds written and continued for said Corporation or guaranteed by said Corporation. This amount is secured by the General Indemnity Agreement held by the Surety Company.

The evidence further shows that the General Indemnity Agreement (marked Defendant's Exhibit B) provides that Constructors of Florida, Inc. pay to American Surety Company of New York all reasonable attorneys' fees, costs and expenses incurred by American Surety Company of New York in defense of any action brought on or in connection with any of the bonds written on behalf of Constructors of Florida, Inc. As a part of the consequential damages which proximately and naturally flow from the Banks usurious charges and the improper manner in which the loan accounts were handled by them, such attorneys' fees are found to be a part of the damages which Constructors of Florida, Inc. should recover against the Banks in that Constructors of Florida, Inc. has obligated itself to pay such attorneys' fees to American Surety Company of New York. A reasonable fee is hereby fixed in the amount of $45,000.00.

The evidence further shows that under the terms and provisions of the mortgage which American Surety Company of New York is foreclosing by this action against Constructors of Florida, Inc. in the principal amount of ap-

proximately $1,367,379.19, Constructors of Florida, Inc. is obligated to pay American Surety Company of New York such reasonable attorneys' fees as may be fixed by this Court for the foreclosure of said mortgage. The amount of these attorneys' fees are found to be a part of the consequential damages which proximately and naturally flow from the Banks usurious charges and the improper manner in which the loan accounts were handled by them, and such attorneys' fees should be recovered by Constructors of Florida, Inc. from said Banks. A reasonable fee is hereby fixed in the amount of $27,347.58 (2% of amount foreclosed).

The charges and actions of the Banks in the handling of the loan accounts contributed materially to the collapse of Constructors of Florida, Inc. and the attorneys' fees fixed herein together with the costs of this proceeding should be and are taxed against said Banks.

The motions of the various parties made throughout the proceedings upon which ruling was reserved by the Court in two prior orders are all hereby denied.

This Partial Final Decree is subject to the undetermined claims and counterclaims of the "secondary issues" and parties not herein decided. A "Final Decree" will be issued by the Court at the conclusion of the entire matter implementing the findings made herein and disposing of all issues between all parties.

DONE AND ORDERED at Miami, Dade County, Florida, this 26th day of June, 1958.

s/ GRADY L. CRAWFORD
Circuit Judge

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. IN CHANCERY.

Case No. 205613-E.
(Judge Crawford)

CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc.,
Plaintiffs,

vs.

CONSTRUCTORS OF FLORIDA, INC., et al.,
Defendants.

ORDER AMENDING PARTIAL FINAL DECREE.

THIS COURT having again considered the case of *Rosenblum* v. *Hart*, (Supreme Court of Florida, May 8, 1957) 95 So.2d 18, hereby amends that Partial Final Decree entered herein on the 26th day of June, 1958, by substituting new pages 9 and 9-a attached hereto and made a part hereof for and in lieu of page 9 which is contained in the said Partial Final Decree, and hereby orders and decrees,

That except as provided herein the said Partial Final Decree as entered by this Court be and the same shall remain in full force and effect, and this Court hereby ratifies and approves in all respects the said Partial Final Decree as amended by the attached new pages 9 and 9-a which shall be considered as a part of the said Partial Final Decree just as if they had been inserted therein in the first instance.

DONE and ORDERED at Miami, Dade County, Florida, this 2nd day of July, 1958.

s/ Grady L. Crawford
Circuit Judge

Inasmuch as the plaintiffs were joint adventurers, and agent and principal each for the other, each is liable for the total amount of such damage, and the Federal Banking Code has no application to prevent imposition of the Statutes of the State of Florida as to usury penalties. Accordingly, plaintiff, CORAL GABLES FIRST NATIONAL BANK, is liable either to CONSTRUCTORS OF FLORIDA, INC. or to its Receiver, under the terms of the Federal Banking Code (12 U.S.C.A. Sec. 86 , and plaintiff, PAN AMERICAN BANK OF MIAMI, is liable either to CONSTRUCTORS OF FLORIDA, INC. or to its Receiver, under the terms of Sec. 687.07, Florida Statutes, 1957, as follows:

(a) Liability of Coral Gables First National Bank	
(1) For double the interest collected prior to March 20, 1957, in the amount of $49,855.44, as per Schedule 1, Pentland, Purvis, Keller & Co. audit, Plaintiffs' Exhibit No. 47	$ 99,710.88
(2) For double the interest collected subsequent to March 20, 1957, in the amount of $5,370.35, per note jackets covering the renewal contract note, Defendants' Exhibits I and J	10,740.70
	$110,451.58
Less amount credited to principal on re-negotiation	35,584.06
	$ 74,867.52
(b) Liability of Pan American Bank of Miami	
(1) For the principal and interest paid prior to March 20, 1957, as per Schedule 1, Pentland, Purvis, Keller & Co. audit, Plaintiffs' Exhibit No. 47	$194,156.11

(2) For the principal paid subsequent to March 20, 1957, as per note jackets (Defendants' Exhibits I and J) covering the portions of the renewal contract note ostensibly held by each of the Plaintiffs and proved by the following computation:

Balance due as of March 20, 1957	$218,275.27	
Less, balance remaining due	151,802.46	
		$ 66,472.81

(3) For the interest paid subsequent to March 20, 1957, as per the same note jackets (Defendants' Exhibits I and J) 5,370.35

Total principal and interest due by Pan American Bank of Miami (as per the above and as per testimony of Esten A. Ulmer, C.P.A., ending at Tr. 774) $265,999.27

(c) Liability of both Plaintiff-Banks

For cancellation of principal and interest allegedly remaining due, as per note jacket (Defendants' Exhibits I and J) and testimony of Frank W. Colton, at Tr. 627, Tr. 650)

	Principal	Interest	Total
Jacket I	$136,622.22	$18,733.34	$155,355.56
Jacket J	15,180.24	2,049.49	17,229.73
Total	$151,802.46	$20,782.83	$172,585.29

$172,585.29

Total Usury Damages $513,452.08

At the time the Banks wrongfully applied the balance of $179,540.67 remaining in Collateral Account No. 2 to the reduction of the face amount due of the $442,400 loan, neither of the notes of July 25, 1956 and July 24, 1956 held by the Banks and secured by chattel equipment mortgages, were due or in default. The action of the Banks helped bring about the subsequent defaults in these loans and the amount seized by the Banks from Collateral Account No. 2 was more than enough to pay said loans in

full or keep them current and in good standing. The debts are still due on said notes by the Corporation to the Banks in the amounts of

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1960

THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc., Appellants, vs. CONSTRUCTORS OF FLORIDA, INC., etc., et al., Appellees.	Case No. 58-526.
CONSTRUCTORS OF FLORIDA, INC., etc., et al., Appellants, vs. THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc., Appellees.	Case No. 58-542.
AMERICAN SURETY COMPANY OF NEW YORK, etc., Appellant, vs. THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc., Appellees.	Case No. 58-543.
CITY OF WEST PALM BEACH, FLORIDA, etc., Appellant, vs. THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc., Appellees.	Case No. 58-544.

Opinion filed March 22, 1960.

Appeals from the Circuit Court for Dade County, Grady L. Crawford, Judge.

Ward & Ward and Salley & Roman, for Coral Gables First National Bank and Pan American Bank of Miami.

Fuller Warren, for Constructors of Florida, Richard R. Reynolds, Jim M. Lancaster, Jr., and Earl L. Goodwin.

John H. Gunn and Thomas A. Horkan, Jr., for John Nicholas.

Egbert Beall, of West Palm Beach, for City of West Palm Beach.

Blackwell, Walker & Gray, for American Surety Company of New York.

Tom Maxey, in propria persona.

HORTON, Chief Judge.

In the main appeal, (=58-526) the appellants Coral Gables First National Bank and Pan American Bank of Miami, hereinafter referred to as Banks, seek review of a partial final decree, as amended, which adjudicated that a certain loan transaction between appellants and appellee Constructors of Florida, hereinafter referred to as Constructors, was usurious. American Surety Company of New York, hereinafter referred to as Surety, the City of West Palm Beach, hereinafter referred to as City, and Richard R. Reynolds, J. M. Lancaster, Jr., and Earl L. Goodwin, the individual officers of Constructors, hereinafter referred to as Individuals, have filed joinders in the main appeal, and, in addition, the following separate appeals have been filed seeking review of this same decree:

In appeal =58-542, appellants Constructors and Individuals contend that the chancellor erred in failing to award them damages in the form of losses sustained as a result of the Banks' action in effecting a loan with a usurious rate of interest and breach of a loan contract.

In appeal =58-543, appellant Surety contends that the chancellor erred in failing to award to Surety damages in

the form of losses sustained as a result of the Banks' intentional fraudulent and tortious acts; in not awarding to Surety punitive damages; and in not granting to Surety additional attorneys' fees.

In appeal #58-544, appellant City contends that the chancellor erred in failing to award to City damages in the form of losses resulting from the tortious interference by Banks in the contract between City and Constructors.

These appeals were consolidated by order of this court and will be treated together in this opinion.

The Banks instituted suit to foreclose three chattel mortgages dated July 24 and July 25, 1956, and March 20, 1957, upon which there was due the sums of $13,888.95, $92,690.85 and $151,802.46, respectively, and to impose liability for any deficiency upon appellees Surety and City.

All defendants served with process filed answers denying liability. Appellees Constructors and Individuals counterclaimed, alleging that the note and mortgage dated March 20, 1957, was a renewal of an earlier note and mortgage dated November 14, 1956, in the sum of $442,400 given by Constructors to the appellant Banks and that said loan was usurious. In essence, the counterclaim alleged that the Banks, by withholding a portion of the proceeds of said loan, and charging and receiving interest in excess of that allowed by law, and by the breach of its loan agreement, directly caused the financial collapse of the appellee Constructors; that such actions by appellants caused Constructors to decline a bona fide offer to purchase 40% of its authorized capital stock for $400,000. Damages totalling more than six million dollars were claimed by Constructors and its officers.

The appellee Surety counterclaimed against appellants, adopting the position as to the usurious nature of the loan

alleged by the appellee Constructors and further claimed damages against the Banks because of alleged false information furnished Surety by the Banks as to the financial condition of Constructors which resulted in the Surety's writing additional bonds for Constructors and deterred Surety from taking over certain contracts of Constructors, all of which allegedly resulted in losses to Surety of more than a million dollars. Surety further cross-claimed against appellee Constructors for sums in excess of one million dollars, and attorneys' fees, allegedly due upon some 63 promissory notes secured by chattel mortgages.

The appellee City counterclaimed, adopting the factual allegations of the answers and counterclaims of the other appellees, and, in addition, contended that the tortious interference of the Banks in contractual relationships between Constructors and the City resulted in the City's being required to take over contracts held by Constructors with City and thereby the City sustained a loss in excess in excess of $200,000.

There were other pleadings by parties to this action, but they do not appear relevant to the issues on these appeals and therefore are not being delineated.

The charge of usury in this case evolved out of a transaction which originally took place on November 14, 1956, when Constructors executed and delivered to the Coral Gables First National Bank a chattel mortgage securing a promissory note in the sum of $442,400. This note was payable in 23 monthly installments of $3,000 each and a 24th installment of $373,400, all with interest at 5% per annum. The note also bore interest from maturity at 8%. The security for this loan was a chattel mortgage on all of the equipment of Constructors, together with an

assignment of payments due Constructors under two sewer contracts, Numbers 7 and 9, with City. At the time of the execution of the $442,400 note and mortgage, Constructors was indebted to the National bank on two prior loans executed in July, 1956, in the original sums of $22,222.32 and $148,305.26, respectively, both loans secured by chattel mortgages on equipment of Constructors, all of which was subsequently repledged as security for the $442,400 loan of November 14, 1956. There was also outstanding an interim loan of $60,000 due by Constructors to the National Bank.

From the proceeds of the $442,400 loan of November 14, 1956, the following disbursements appear to have been made:

1) $60,000 to the Coral Gables First National Bank in repayment of the interim loan by Constructors of Florida.

2) $44,854.44 to the Coral Gables First National Bank as a commitment fee.

3) $44,240 as advanced interest for two years.

4) $90,743.18 was deposited with the Coral Gables First National Bank in Collateral Account #1, held jointly in the names of Constructors of Florida and the Coral Gables First National Bank, withdrawals from which required the signature of an officer of the Bank and the signature of an officer of Constructors of Florida.

5) $202,562.38 to the account of Constructors of Florida.

The commitment fee (item #2 above—$44,854.44) was subsequently transferred by the National bank into Collateral Account #1, making that account total $135,597.62. The funds from Collateral Account #1 were disbursed at

intervals to the account of Constructors over a period of time from November 23, 1956, through January 7, 1957, when the entire account was exhausted.

The National bank established a second account known as Collateral Account #2, in which it deposited the proceeds of payments received by it from City under the assignment of payments given by Constructors to the bank to secure the payment of the November 14, 1956, loan. The following amounts were received by the bank from City and deposited in Collateral Account #2:

November 29, 1956—	$36,488.11
December 24, 1956—	42,750.32
January 24, 1957—	53,247.39
February 26, 1957—	24,168.04
March 1, 1957—	37,502.25

making a total of $194,156.11. It was from Collateral Account #2 that the National bank, from time to time, deducted the monthly payments of $3,000 plus 5% interest due under the terms of the note of November 14, 1956. These deductions were as follows:

Date	Principal	Interest
December 17, 1956	$ 3,000.00	$1,843.35
January 14, 1957	3,000.00	1,893.13
February 14, 1957	3,000.00	1,878.96
March 7, 1957	179,540.67	
Totals	$188,540.67	$5,615.44

In the early part of March, 1957, Constructors, being in straightened financial circumstances, requested the National bank to release approximately $50,000 from Collateral Account #2 to the general account of Constructors. The request for the release of these funds was made by

letter from Constructors to the National bank and accompanied by a statement which purported to justify the requested funds. After some negotiation with an officer of Constructors, the bank agreed that $50,000 would be advanced to the general account of Constructors out of Collateral Account =2, and in accord with that agreement, an officer of Constructors left with an officer of the National bank a signed, undated blank check. Instead of making the transfer of the $50,000, as Constructors alleged it was agreed, the check was filled in by some officer or employee of the National bank for the sum of $179,540.67 (which was the total amount remaining in Collateral Account =2), countersigned by an officer of the bank, and applied against the balance due on the $442,400 note. It is contended that this application by the National bank was made without the knowledge or consent of Constructors.

After the National bank had applied the $179,540.67 as aforesaid, a meeting was had among all of the parties which resulted in the execution of a new note, termed a renewal note, dated March 20, 1957, for the sum of $218,275.27, bearing interest at the rate of 15% per annum. At the same time, a usury release was executed by Constructors in favor of the National bank. There was also executed at this time a loan repayment agreement in which it was stipulated that from payments received on sewer contracts Numbers 7 and 9 with the City, the National bank would apply 65% against the indebtedness due the bank by Constructors, and 35% would be deposited into a controlled account to be used by Constructors. The March 20, 1957, note for $218,275.27 was, at the time of the Institution of this suit, reduced by payments to $151,802.46.

Coral Gables First National Bank, as indicated by its name, is a national banking institution chartered under the laws of the United States, and is not permitted to lend

amounts in excess of 10% of its capital and surplus. In this instance, its limit was $200,000.00. The Pan American Bank of Miami, being a state chartered institution, had no such limitation. It appears, therefore, that when the loan of November 14, 1956, was made, or shortly thereafter, the appellant Pan American was a participant in this loan to the extent of approximately $243,320. The chancellor made a finding regarding the entire participation between the two appellant Banks in the decree from which appeal is taken.[1]

The chancellor found, among other things, that the interest charged and reserved by the Banks on account of the November 14, 1956, loan exceeded 25% per annum; that appellant Banks were joint adventurers and agent and principal each for the other, and imposed penalties against the National bank under the terms of the Federal Banking Code (12 U.S.C.A., S86) and the State bank under

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(1) "However, Pan American Bank of Miami, as participant in each of these three (3) loans, was debited by Coral Gables First National Bank with the sums of $19,444.53, $129,767.19, and $243,320.00, or a total of $392,531.72. Actually, therefore, Coral Gables First National Bank was merely a conduit, and agent; the new loan of $442,400.00 did not, according to the books and records of Coral Gables First National Bank, increase the net amount of the indebtedness of Constructors of Florida, Inc.; rather, the net amount of indebtedness to Coral Gables First National Bank, after the new loan of $442,400.00, actually decreased from $209,211.62 to $19,242.38, a net decrease of $188,969.24. In other words, immediately prior to the consummation of the alleged $442,400.00 loan on November 14, 1956, Constructors of Florida, Inc. was indebted to Coral Gables First National Bank in the amount of $209,211.62; immediately after the consummation of the alleged (sic) $442,400.00 loan, Constructors of Florida, Inc. was indebted to Coral Gables First National Bank only in the small amount of $19,242.38. By loaning $393,531.72 of the money of Pan American Bank of Miami, Coral Gables First National Bank decreased its outstanding loans by $188,969.24."

the terms of S687.07, Fla. Stat., F.S.A. The penalties imposed by the chancellor are summarized as follows:

(a) Liability of Coral Gables First National Bank		
(1) Double the interest collected to March 20, 1957	$ 99,710.88	
(2) Double the interest collected subsequent to March 20, 1957	10,740.70	
	$110,451.58	
Less amount credited to principal on renegotiation	35,584.06	
Total		$ 74,867.52
(b) Liability of Pan American Bank of Miami		
(1) Principal & interest paid to March 20, 1957	$194,156.11	
(2) Principal paid subsequent to March 20, 1957	66,472.81	
(3) Interest paid subsequent to March 20, 1957	5,370.35	
Total		$265,999.27
(c) Liability of Both Plaintiff Banks		
For cancellation of principal and interest remaining due		$172,585.29

The chancellor further found that the notes of July 24, 1956, and July 25, 1956, secured by chattel equipment mortgages, were not in default and could be paid in accordance with their respective terms with principal payments held in abeyance from the time of the alleged default to the time of the entry of a complete final decree in this cause; that the liens of City and Surety against the chattels and equipment of Constructors were superior to any claim of the Banks in this proceeding.

The chancellor found that the evidence was not sufficient to prove by a preponderance that Banks were solely responsible or liable for (1) damages suffered by Constructors resulting from the collapse of its business and forfeiture of its contracts; (2) damages suffered by Individuals resulting from the loss of value of the stock of Constructors, loss of profit, or liability of personal guarantees other than those given to Banks; (3) damages suffered by City in connection with the completion of sewer contracts Numbers 7 and 9; and (4) damages suffered by Surety on account of various bonds written or continued for Constructors and Island Construction Company.

The chancellor found that the evidence did show that (1) City did not agree in any way to guarantee any part of the loan made by Banks to Constructors and there was no basis for equitable subrogation in favor of Banks and against City; (2) City is protected in the amounts expended to complete sewer contracts Numbers 7 and 9 by bonds written by Surety; (3) Surety did not agree in any way to guarantee any part of the loans made by Banks to Constructors and there was no basis for any equitable subrogation in favor of Banks and against Surety; (4) Constructors was indebted to Surety in the amount of $1,367,379.19 on account of the various bonds written and continued for Constructors or guaranteed by Constructors; and (5) Constructors should recover against Banks for payment to Surety reasonable attorneys' fees in the amounts of $45,000 and $27,347.50 as part of the consequential damages resulting from the Banks' usurious charges and the improper manner in which the loan accounts were handled by them.

The Banks' main contention is that the transaction was not usurious. They urge that the loan was not usurious at its inception and assuming, but not admitting,

that it might have been, that the same was eliminated by a new contract purging the old contract of the vice of usury and making the new a valid and enforceable obligation. These arguments are without substance, particularly when viewed in the light of the evidence adduced before the chancellor. The chancellor's findings of fact and conclusions as to the usurious character of this transaction are amply supported by the record. To demonstrate that there was usury from its inception would unduly extend an already lengthy opinion. Suffice it to say that where a borrower receives a net of approximately $263,000 from a $442,400 loan, it requires little mathematical calculation to discern that something is amiss.

The Banks' secondary argument that a new contract was entered into that purged the old of its usurious odor is not borne out by the record, including their own pleadings. The Banks, in their complaint seeking foreclosure of the mortgage in question, affirmatively alleged that "on March 20, 1957, there was due and unpaid on said note of $442,400 (plaintiff's Exhibit 3) the principal sum of $218,275.27 as evidenced by a *renewal contract note* of that date in the sum of $218,275.27. * * * Plaintiffs would show unto the Court that *said renewal note* of $218,275.27 *was simply a renewal and extension of the note of November 14, 1956*, in the sum of $442,400 * * *." (Emphasis supplied). The general rule followed in this state is that the usurious character of a contract must be determined as of the date of its inception, and if usurious at that time, no subsequent transactions will purge it. When such contracts are *renewed* by a *new* or *substituted contract, usury follows* and becomes a part of the latter contract, making it vulnerable to the defense of usury in like manner as the original contract. This is not true, however, *when the old contract is abandoned* and *a new one is entered into*

free from the vice of the old. See Shorr v. Skafte, Fla. 1956, 90 So.2d 604, and Wenck v. Insurance Agents Finance Corp., Fla. App. 1958, 99 So.2d 883.

Banks further urge that the chancellor was in error in imposing upon the National bank penalties in excess of that permitted by S 86, Title 12, U.S.C.A., and in imposing upon the State bank affirmative penalties in excess of $265,000, when the State bank held only a 5% participation in the renewal note of March 20, 1957; also that a portion of the $265,000, penalty, representing principal paid on the March 20, 1957, note, was wrongfully assessed against the State bank when the evidence shows that such payment was made to the National bank.

Sections 85 and 86, Title 12, U.S.C.A., in substance provide that a National bank may take, receive, reserve and charge interest at the rate allowed by the laws of the state where the bank is located and when a greater is knowingly charged, *the entire interest provided for by the note, etc., shall be forfeited.* Where the interest has been *paid*, the person so paying it may *recover back twice the amount paid.* No other penalties are provided and the Federal Courts, as well as a majority of the State courts, have held that no other penalties except those provided in the Act can be invoked against a National bank. See Farmers' etc., Nat. Bank v. Dearing, 91 U.S. 29, 23 L.Ed. 196 (1875) and subsequent cases collected at 12 U.S.C.A. 343.

The Banks argue that some of the penalties assessed against the National bank are in excess of those permitted under the Federal Act, insisting that the only penalty that should be imposed against the National bank is double the amount of interest actually *paid.* This argument is premised on the fact that there may have been usury in the original loan of November 14, 1956, but in no event could such penalties be applied as against the interest collected

after March 20, 1957, the date of the renegotiation of the original loan. Concluding as we have that the original loan was usurious, we reject this contention of the Banks as being without merit.

Another question raised collateral to the Banks' argument that penalties were unlawfully and illegally assessed against the National bank, is that portion of the decree which voided the right of both Banks to collect the balance of $151,802.46, plus interest, the sum allegedly remaining due and unpaid on the renegotiated loan of March 20, 1957. This latter contention of the Banks is bottomed upon the factual premise that the State bank had a participation of only 10% in the renegotiated loan, with the balance of the loan allegedly represented by the funds of the National bank. This contention has partial merit, that is to say, that the Federal Act applicable to National banks as well as the decisions construing the same have almost unanimously concluded that only those penalties provided by the Federal Act could be invoked against a National bank. However, the record in this case discloses, and the chancellor found, that the loan was usurious in its inception, i.e., November 14, 1956. We have concurred in this conclusion; consequently, it is necessary to analyze the status of the participation of the respective banks at the time that the loan was found to be usurious. On November 14, 1956, or shortly thereafter, the National bank participated to the State bank $243,320 of the original loan. However, since the record clearly demonstrates, and the chancellor found, that the borrower received at most approximately $263,000 from the loan of $442,400, it would follow that the State bank's participation in the funds actually made available to the borrower was in excess of 92% of the amounts loaned. Likewise, it follows that the National bank would have furnished slightly in excess of 7% of the original monies loaned. A careful scrutiny of the

proceedings that took place at the time of and subsequent to the making of the original loan indicates that by the device of participation, the State bank attempted to lend its funds through a chartered National bank without subjecting itself to the loss of its principal in the event that the loan was found to be usurious under S 687.07, Fla.Stat., F.S.A. The most that the State bank could lose if this device was unsuccessful, using the National bank as its conduit, would be double the interest actually received by the National bank or a forfeiture of interest that was to accrue. In the final analysis, we conclude that the chancellor was correct in forfeiting interest due and unpaid as it applied to both the State and National banks, but that he was in error when he decreed a forfeiture of the entire amount of principal. Such portion of the remaining unpaid principal on the original loan, hereinabove noted to be approximately 7%, as had not been participated by the National bank to the State bank should have been reserved by the chancellor's decree to the National bank rather than forfeited. In forfeiting that portion of the unpaid balance of the principal belonging to the National bank, the chancellor's decree conflicts with the decisions of the Federal courts as well as those of many state courts of last resort, which hold that only the penalties prescribed by the Federal Act can be invoked against a national bank, namely an affirmative forfeiture of double the amount of interest actually paid or a cancellation or forfeiture of interest that is to accrue and is unpaid.

Another question raised by the Banks was the propriety or correctness of that portion of the decree awarding against Banks, as consequential damages, attorneys' fees contracted to be paid by Constructors to Surety under the terms of a general indemnity agreement between said parties. This arose out of the chancellor's award to Surety of sums due it under the general indemnity agreement as

claimed in Surety's counterclaim against Constructors. We think the award of attorneys' fees against the Banks was erroneous, first because attorney's fees as such cannot be awarded in the absence of statute or contract. See Hoffman v. Barlly, Fla. App. 1957, 97 So.2d 355, and cases cited therein. Secondly, the award would appear to be inconsistent with the chancellor's finding that the evidence was insufficient to establish that the Banks were solely responsible for all damage suffered by Constructors resulting from the collapse of its business. In either event, we see no basis for the award of attorneys' fees here against the Banks.

The Banks have urged other points for reversal and they have been duly considered, but found to be without merit.

Upon the appeal of Constructors and Individuals (#58-542) they claim error in the failure of the chancellor to award them damages in the form of losses suffered by each as a consequence of the Banks' tortious breach of contract including the act of charging a usurious rate of interest. This may be the rule as applied to torts generally, but these appellants have not cited any authority, and our research has failed to uncover any, that permits an award of consequential damages resulting from a violation of the usury statute in addition to the penalties prescribed by that statute. The Supreme Court of Florida long ago in Matlack Properties v. Citizens and Southern Nat. Bank, 120 Fla. 77, 162 So. 148, held that but for the statute usury was not forbidden, indicating that the subject of usury was one entirely of statutory regulations and prohibition. See Yaffee v. International Company, Fla. 1955, 80 So.2d 910. See also Sodi, Inc. v. Salitan, Fla. 1953, 68 So.2d 882. Further, the Supreme Court of Florida, in Rosenblum v. Hart, Fla. 1957, 95 So.2d 18, held that the penalties provided for

under SS 687.04 and 687.07, Fla. Stat., F.S.A., are not cumulative but must be applied separately to the degrees of usury defined by the statutes. Nevertheless, from our review of the record, we conclude, as did the able chancellor, that appellants failed to prove, by a preponderance of the evidence, that Banks were solely responsible or liable for all damages suffered by appellants.

The contentions of Surety and City, as evidenced by their appeals, (#58-543 and #58-544, respectively) and assignments of error therein, simply take issue with the chancellor's conclusions based upon the evidence. We have carefully considered the points raised by each appellant but are constrained to conclude that there was competent substantial evidence in the record to support the findings and conclusions of the chancellor.

The record in this case included approximately 2,000 pages of testimony and more than 100 exhibits. Able counsel for the parties on both sides are to be commended for clarity as well as brevity in the presentation of a complicated and voluminous factual case.

In the light of the views expressed, we conclude that the chancellor, in imposing against the National bank as a penalty, the forfeiture of a portion of the unpaid principal of $151,802.46 not participated to the State bank, committed error; that upon a remand of this cause, he should ascertain and determine this amount, and enter an appropriate decree reserving the same to the National bank. We further conclude that the decree, insofar as it awards against Banks attorneys' fees to Constructors, is in error and the same is hereby reversed. In all other respects, the decree appealed is affirmed.

Affirmed in part, reversed in part and remanded with directions.

PEARSON and CARROLL, CHAS., JJ., concur.

MANDATE FROM DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

To the Honorable, the Judges of the CIRCUIT Court for the ELEVENTH JUDICIAL CIRCUIT of Florida, Greeting:

WHEREAS, Lately in the CIRCUIT Court of THE ELEVENTH JUDICIAL CIRCUIT IN AND for the County of DADE in a cause wherein

THE CORAL GABLES FIRST NATIONAL BANK, etc., and PAN AMERICAN BANK OF MIAMI, etc.,
plaintiffs

and

CONSTRUCTORS OF FLORIDA, INC., et al.,
defendants

(Chancery No. 205613.)

the decree of said Circuit Court was rendered June 30, 1958 as by the inspection of the transcript of the record of the said Circuit Court which was brought into the District Court of Appeal, Third District of the State of Florida, by virtue of appeals agreeably to the laws of said State in such case made and provided, fully and at large appears.

AND WHEREAS, at the JANUARY Term of said District Court of Appeal holden at Miami, A.D., 1960, the said cause came on to be heard before the said District Court of Appeal on the said record of March, A.D., 1960, the said District Court of Appeal rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It is Ordered by the Court that the appellants do have and recover of and from the

appellees costs in this behalf expended herein taxed at Twenty-five Dollars, and that all other costs shall be taxed in the court in which the appeal was entered, therefore

YOU ARE HEREBY COMMANDED, That such further proceedings be had in said cause as according to right, justice, the judgment of said District Court of Appeal and the laws of the State of Florida, ought to be had, the said decree of the Circuit Court notwithstanding.

WITNESS, The Honorable MALLORY HORTON, Chief Judge of said District Court of Appeal, and the seal of said Court at Miami, this 4th day of May, 1960.

/s/ WILLIAM P. CARTER,
Clerk District Court of Appeal of Florida, Third District.

A True Copy

ATTEST:

William P. Carter,
Clerk District Court of Appeal,
Third District.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.
IN CHANCERY.

Case No. 205613-E (Crawford).

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Plaintiffs,

vs.

CONSTRUCTORS OF FLORIDA, INC., etc., et al.,
Defendants.

ORDER AND JUDGMENT ON MANDATE.

THIS CAUSE came on to be heard pursuant to notice on the motion of plaintiffs for findings and decree on mandate; on the response thereto of defendants; and on the motion of defendants for judgment or decree on mandate. The Court having considered said motions and response, as well as the exhibits thereto annexed, and having heard argument of counsel thereon, and having considered the Opinion and Mandate of the District Court of Appeal of Florida, Third District, filed herein on May 5, 1960, is of the opinion that the various proceedings for the re-organization of defendant, CONSTRUCTORS OF FLORIDA, INC., in no way supersede the jurisdiction of this Court to comply with said Opinion and Mandate, and that the Motion for Order on Mandate filed herein by plaintiffs should be, and it is hereby denied.

It appearing that the directions of said District Court of Appeal require this Court to make certain additional findings of fact, and to modify this Court's Partial Final Decree entered herein on June 26, 1958, as amended July 2, 1958, and upon consideration of the evidence hereto-

fore adduced before this Court, the Court makes the following additional findings of fact:

(a) The borrower, CONSTRUCTORS OF FLORIDA, INC., received on November 14, 1956, out of the proceeds of the loan of the same date, the sum of $262,562.38.

(b) Of the aforesaid amount actually received by the borrower, and by reason of the participation of the State Bank therein to the extent of $243,320.00, the National Bank advanced only $19,242.38, or 7.33% of the funds actually received by the borrower.

(c) That the principal amount due on the said note of November 14, 1956, as of the institution of this action, was $151,802.46; and that 7.33% of $151,802.46 is $11,271.20.

It is, therefore, ORDERED, ADJUDGED and DECREED that this Court's Partial Final Decree of June 26, 1958, as amended July 2, 1958, is modified in the following respects:

1. The sum of $11,271.20, being the portion of the unpaid principal not participated by the National Bank to the State Bank on the loan of November 14, 1956, is reserved to the National Bank; but the mortgage securing said obligation is void and unenforceable in these proceedings, as said Bank is not in equity with clean hands.

2. So much of said Partial Final Decree as awards to CONSTRUCTORS against Banks consequential damages based upon attorney's fees awarded to SURETY against CONSTRUCTORS in the amounts of $45,000 and $27,347.50, is vacated, set aside and quashed only as to Banks.

OTHERWISE, said Partial Final Decree of June 26, 1958, as amended July 2, 1958, is hereby re-affirmed and re-adopted, and remains in full force and effect.

And it is further ORDERED, ADJUDGED and DECREED:

I. That JOHN NICHOLAS, as Trustee for CONSTRUCTORS OF FLORIDA, INC., on his counterclaim, have and take from the plaintiff CORAL GABLES FIRST NATIONAL BANK, the principal sum of SEVENTY-FOUR THOUSAND EIGHT HUNDRED SIXTY-SEVEN DOLLARS AND FIFTY-TWO CENTS ($74,867.52), with interest as provided by law from July 2, 1958, for which sums let execution immediately issue.

II. That JOHN NICHOLAS, as Trustee for CONSTRUCTORS OF FLORIDA, INC., on his counterclaim, have and take from the plaintiff, PAN AMERICAN BANK OF MIAMI, the principal sum of TWO HUNDRED SIXTY-FIVE THOUSAND NINE HUNDRED NINETY-NINE DOLLARS AND TWENTY-SEVEN CENTS ($265,999.27), with interest as provided by law from July 2, 1958, for which sums let execution immediately issue.

III. That CONSTRUCTORS OF FLORIDA, INC. is indebted to CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI in the amounts of FOURTEEN THOUSAND THREE HUNDRED TWENTY-SIX DOLLARS AND SEVENTY-SEVEN CENTS $14,326.77), and NINETY-FIVE THOUSAND SIX HUNDRED THIRTY-SIX DOLLARS AND SEVENTY-SEVEN CENTS ($95,636.77), principal and interest included to May 1, 1958, respectively, on the loans of July 25, 1956, and July 24, 1956; but the mortgages allegedly securing said loans are not enforceable as said Banks are not in equity with clean hands. Said loans were not in default as of the commencement of this action. The Court does not determine whether or not said loans are now in default inasmuch as the United States District Court for the Southern District of Florida, in the proceedings for the re-organization of CON-

STRUCTORS OF FLORIDA, INC. has assumed jurisdiction of said claims.

IV. That CONSTRUCTORS OF FLORIDA, INC. is indebted to CORAL GABLES FIRST NATIONAL BANK in the amount of ELEVEN THOUSAND TWO HUNDRED SEVENTY-ONE DOLLARS AND TWENTY CENTS ($11,271.20) on the loan of November 14, 1956; but the mortgages allegedly securing said loan are not enforceable as said Banks are not in equity with clean hands. Said loan was not in default as of the commencement of this action. The Court does not determine whether or not said loan is now in default inasmuch as the United States District Court for the South District of Florida, in the proceedings for the re-organization of CONSTRUCTORS OF FLORIDA, INC., has assumed jurisdiction of said claims.

V. That the amounts awarded JOHN NICHOLAS as Trustee for CONSTRUCTORS OF FLORIDA, INC. by Paragraphs I and II hereof are not subject to offset by reason of the claims of Banks against CONSTRUCTORS OF FLORIDA, INC. as set forth in Paragraphs III and IV hereof.

VI. That plaintiff, PAN AMERICAN BANK OF MIAMI, and plaintiff, CORAL GABLES FIRST NATIONAL BANK, take nothing on account of their claims against the defendants, AMERICAN SURETY COMPANY OF NEW YORK, City of West Palm Beach, RICHARD R. REYNOLDS, JIM M. LANCASTER, Jr. and EARL L. GOODWIN.

VII. That counterclaimants, RICHARD R. REYNOLDS, JIM M. LANCASTER, Jr. and EARL L. GOODWIN, take nothing on their counterclaims against Plaintiff-Banks.

VIII. That counterclaimant, AMERICAN SURETY COMPANY OF NEW YORK, take nothing on its counterclaim against Plaintiff-Banks.

IX. That the lien of AMERICAN SURETY COMPANY OF NEW YORK on the chattels and equipment of CONSTRUCTORS OF FLORIDA, INC. on account of the Chattel Mortgage sought to be foreclosed herein, in the principal amount of ONE MILLION THREE HUNDRED SIXTY-SEVEN THOUSAND THREE HUNDRED SEVENTY-NINE DOLLARS AND NINETEEN CENTS ($1,367,379.19), and interest thereon, plus attorney's fees in the amount of SEVENTY-TWO THOUSAND THREE HUNDRED FORTY-SEVEN DOLLARS AND FIFTY-EIGHT CENTS ($72,347.58), is superior to any claim of Banks asserted herein; but the Court reserves decision as to the various claims and counterclaims asserted between the Trustee and AMERICAN SURETY COMPANY OF NEW YORK, pending the outcome of the second phase of this action.

X. Costs of this proceeding are hereby taxed against the Banks in an amount to be hereafter determined on motion of the defendants.

DONE and ORDERED at Miami, Florida this 14th day of April 1961.

s/ GRADY L. CRAWFORD
CIRCUIT JUDGE.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY.
IN CHANCERY.

NO. 205613-E
(Crawford).

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Plaintiffs,
vs.
CONSTRUCTORS OF FLORIDA, INC., etc., et al.,
Defendants.

(Filed April 17, 1961.)

NOTICE OF INTERLOCUTORY APPEAL.

COME NOW the Plaintiffs, CORAL GABLES FIRST NATIONAL BANK, a United States Banking corporation, and PAN AMERICAN BANK OF MIAMI, a State Banking corporation, organized under the laws of the State of Florida, by and through their attorneys of record, and take and enter their Interlocutory Appeal to the District Court of Appeal in Florida, Third District, to review the Order and Judgment on Mandate entered on the 14th day of April, 1961, in the above entitled cause, recorded in Chancery Order Book 1511 at Page 8, and the Order of said Court dated the 17th day of April, 1961, striking the Petition for Re-Hearing, which said Order was entered on the 17th day of April, 1961, and recorded in Chancery Order Book at Page

This is an Interlocutory Appeal under the provisions of Florida Appellate Rules 4.2, being an Order or Decree

entered after Final Decree, and all parties to said cause are called upon to take notice of the entry of this appeal.

DATED at Miami, Florida, this 17th day of April, 1961.

WARD & WARD,
By: s W. G. WARD,
Attorneys for Coral Gables First National Bank.

WILLIAM B. ROMAN AND LEO L. FOSTER,
By: s WILLIAM B. ROMAN,
Attorneys for Pan American Bank of Miami.

I HEREBY CERTIFY that a true and correct copy of the above Notice of Interlocutory Appeal was mailed to the Attorneys for the Defendants in the above entitled cause, to-wit:

JOHN GUNN, Attorney for JOHN NICHOLAS, as Trustee under chapter X, Federal Bankruptcy Reorganization Proceedings now pending in the United States District Court, Southern District of Florida;

W. L. GRAY, Attorney for AMERICAN SURETY COMPANY OF NEW YORK.

FULLER WARREN, Attorney for CONSTRUCTORS OF FLORIDA, INC., and or JOHN NICHOLAS, as Receiver of CONSTRUCTORS OF FLORIDA, INC.

W. L. GRAY, TOM MAXEY, and EGBERT BEALL, Attorneys for City of West Palm Beach.

FULLER WARREN as Attorney for Richard R. Reynolds, Jim M. Lancaster, Jr., and Earl L. Goodwin, and

TOM MAXEY, as a Defendant in his own right.

DATED April 17, 1961.

WARD & WARD,
By: s W. G. WARD

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY.
IN CHANCERY.

NO. 205613-E (Crawford).

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Plaintiffs,

vs.

CONSTRUCTORS OF FLORIDA, INC., etc. et al.,
Defendants.

ASSIGNMENTS OF ERROR.

Comes now the plaintiffs The Coral Gables First National Bank and Pan American Bank of Miami, and pursuant to the provisions of Rule 4.2 of the Appellate Rules of Florida, assigns as error in support of the interlocutory appeal filed herein, the following matters upon which the plaintiffs rely for reversal of the decree of the lower Court.

That the Circuit Court of Dade County, Florida, in the entry of its judgment on mandate dated April 14, 1961, committed the following errors:

1. That the lower Court did not follow the laws as established by this Court in its order of reversal, in that it allowed as a penalty under the Federal Usury Statute applicable to National Banks, a sum in excess of twice the amount of the interest actually paid by Constructors of Florida, Inc. to the National Bank.

2. That the Court in its judgment of the 14th day of April, 1961, improperly construed the provisions of Section 687.03 of the Florida Statutes as amended in 1955 in holding that on a corporate loan the Court consider the us-

ury penalty where the usury was contracted for or reserved, whereas the Statute as amended only applies to a corporate loan where usury in excess of 15% was paid.

3. The Court in its opinion erred in finding that the Pan American Bank of Miami had received interest payments from Constructors of Florida, when in the other part of its opinion it showed that all of the interest either paid or contracted for was charged at a double rate against the Coral Gables First National Bank, and the only interest, if any, that the Pan American Bank received was on payments made by the National Bank to the Pan American Bank.

4. The Court erred in its opinion in holding as against the National Bank under the Federal Statute governing usury of National Banks that interest reserved in advance was interest paid so as to affect the usury penalty under the State or Federal laws, where a corporation borrower is involved.

5. The Court below in its opinion erred in decreeing forfeitures of the security on some $135,000 of allowed claims in favor of the Coral Gables First National Bank, which would be penalty or punitive damages in excess of any provision contained in the Federal or Florida Statutes for usury penalties.

6. The lower Court erred in its judgment in refusing to grant setoffs of the usury penalties as allowed, as against the claims found to be just and payable in favor of the plaintiffs, contrary to the Florida Laws and the provisions of Section 68, of the National Bankruptcy Act.

7. The Court erred in holding in its final judgment that the mortgage of the American Surety Company which was subsequent in date and priority of the mortgages of the Bank was superior to any mortgage claim or lien of the plaintiff Banks.

8. The lower Court erred in its judgment in holding that the 1955 amendment to usury statute applicable to corporations was inoperative and invalid, and by applying the rule against corporations the same as if an individual had been borrowing the money under the provisions of 687.03.

9. The Court below erred in computing the ratio of principal payments advanced by the Coral Gables First National Bank at 7.33% of the total advanced, and ignoring the additional principal advanced by the National Bank of $135,597.62, which would make the ratio in any event of 55% to the State Bank, and 45% to the National Bank.

10. The Court erred in failing to setoff the cost of the appeal in the first instance, cost of which was assessed by the Mandate of the District Court of Appeal against the appellees.

11. The Court erred in holding that it had not lost jurisdiction of the subject matter, and of the parties in this case by virtue of the changes of the parties, and the status of security pending the appeal to the District Court of Appeal of Florida.

12. The Court erred in refusing to dismiss this cause without prejudice and referring the entire matter to the U. S. District Court, Southern District of Florida, for further proceedings under the National Bankruptcy Reorganization Act.

13. The Court erred in its final decree in taking away the prime security held by the Coral Gables First National Bank as a forfeiture or penalty on the previous mortgages, which were not even alleged to be tainted with usury, and thus taking property of the National Bank without due compensation, or without due process of law.

14. The Court erred in its final judgment in arbitrarily finding that an inferior mortgage held by American

Surety Company was prior in dignity to the prior recorded mortgages held by the National Bank, under the theory that the Banks had come into equity without clean hands, this amounting to a deprivation of the plaintiff Banks Constitutional property rights guaranteed by the State of Florida, and the United States Constitution.

WARD & WARD,
1240 duPont Bldg.,
Miami 32, Florida,
By /s/ W. G. WARD,
Attorneys for Coral Gables National Bank.

LEO FOSTER AND WILLIAM B. ROMAN,
By /s/ WILLIAM B. ROMAN,
Attorneys for Pan American Bank of Miami.

I HEREBY CERTIFY that a copy of the foregoing assignments of error was provided to counsel of record for the defendants, this 17th day of April, A.D., 1961.

/s/ W. G WARD.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT.

JANUARY TERM, A.D., 1961.

THURSDAY, MAY 25, 1961.

CASE NO. 61-230.

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Appellants,

vs.

CONSTRUCTORS OF FLORIDA, INC., etc., et al.,
Appellees.

This cause having come on before the court on appellees' motion to quash interlocutory appeal and the court having considered same, it is ordered that said motion is granted and this interlocutory appeal from the Circuit Court of Dade County, Florida (Chancery No. 205613) be and the same is hereby quashed.

It is further ordered that appellees' motion to assess damages is hereby denied.

A True Copy

ATTEST:

William P. Carter
Clerk District Court of Appeal,
Third District.

(Seal)

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1961
MONDAY, JULY 24, 1961

61,230.

THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America, etc., et al.,
Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation, et al.,
Respondents.

(Filed 1961, September 27.)

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date May 26, 1961, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

TEST:

/s/ Guyte P. McCord
Clerk Supreme Court.

By:
Deputy Clerk.

(Seal)

A True Copy

ATTEST:

/s/ William P. Carter
Clerk District Court of Appeal, Third District.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A.D. 1961

TUESDAY, SEPTEMBER 26, A.D. 1961

61,230.

THE CORAL GABLES FIRST NATIONAL BANK,
a banking institution organized under the laws of the United States of America, etc., et al.,
Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC.,
a Florida corporation, et al.,
Respondents.

(Filed 1961, September 27.)

On consideration of the Petition for Rehearing filed by Attorneys for Petitioners,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A True Copy,

TEST:

/s/ Guyte P. McCord
Clerk Supreme Court.

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ORDER OF JULY 24, 1961, DENYING PETITION FOR WRIT OF CERTIORARI IN THE ABOVE CAUSE.)

A True Copy,

ATTEST:

/s/ William P. Carter
Clerk District Court of Appeal,
Third District.

(Seal)

LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
FEB 16 1962
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1961

No. 621

THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America, having its principal place of business in the City of Coral Gables, Florida, and PAN AMERICAN BANK OF MIAMI, a banking institution organized and existing under the laws of the State of Florida, having its principal place of business in the City of Miami, Dade County, Florida,

Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation having its principal place of business in the City of Coral Gables, Dade County, Florida, and JOHN NICHOLAS, as Trustee under Chapter X, Federal Bankruptcy Reorganization Proceedings now pending in the United States District Court, Southern District of Florida, CITY OF WEST PALM BEACH, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation authorized to do business in the State of Florida, TOM MAXEY, RUSSELL A. ORTMAYER, RICHARD R. REYNOLDS, JIM M. LANCASTER, JR., EARL L. GOODWIN, ISLAND CONSTRUCTION COMPANY, a corporation organized under the laws of Puerto Rico and having its principal place of business in Dade County, Florida, H. S. FLAGG and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAM L. GRAY, JR.,
First Federal Building,
Miami 32, Florida,
Attorney for Respondent, American Surety Company of New York.

FULLER WARREN,
613 Ainsley Building,
Miami, Florida,
Attorney for Respondents, Constructors of Florida, Inc., and John Nicholas,

TOM MAXEY,
3001 Ponce deLeon Boulevard,
Coral Gables, Florida, and
WILLIAM L. GRAY, JR., and
GROVER C. HERRING,
Harvey Building,
West Palm Beach, Florida, and

BLACKWELL, WALKER & GRAY,
First Federal Building,
Miami 32, Florida,
Of Counsel for American Surety Company of New York.

EGBERT BEALL,
Comeau Building,
West Palm Beach, Florida,
Attorneys for Respondent, City of West Palm Beach, Florida.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 621

THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America, having its principal place of business in the City of Coral Gables, Florida, and PAN AMERICAN BANK OF MIAMI, a banking institution organized and existing under the laws of the State of Florida, having its principal place of business in the City of Miami, Dade County, Florida,

Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation having its principal place of business in the City of Coral Gables, Dade County, Florida, and JOHN NICHOLAS, as Trustee under Chapter X, Federal Bankruptcy Reorganization Proceedings now pending in the United States District Court, Southern District of Florida, CITY OF WEST PALM BEACH, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation authorized to do business in the State of Florida, TOM MAXEY, RUSSELL A. ORTMAYER, RICHARD R. REYNOLDS, JIM M. LANCASTER, JR., EARL L. GOODWIN, ISLAND CONSTRUCTION COMPANY, a corporation organized under the laws of Puerto Rico and having its principal place of business in Dade County, Florida, H. S. FLAGG and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

BRIEF FOR RESPONDENTS IN OPPOSITION

I

INTRODUCTORY STATEMENT—DEFINITIONS

Because this is the second Petition for Writ of Certiorari which has been presented to this Court by the same

Petitioners arising from the same Trial Court procedures, and because of the numerous prior State Court appeals, Petitions for Writs of Certiorari, Opinions, and Orders, it is felt that presentation of the position of the Respondents will be facilitated by using certain shortened titles to describe certain Orders, Opinions and Courts to which reference will be continually made. Accordingly, we shall refer to the District Court of Appeal of Florida, Third District, as "Florida District Court". We shall refer to the first Opinion rendered by that Court in these proceedings on March 22, 1960 (119 So.2d 741, PR. 22-41, A. 16-30), as "*1960 Florida District Court Opinion*". Similarly, we shall refer to the second Order of the Florida District Court, entered May 25, 1961 (132 So.2d 806, PR. 230, A. 73), as "*1961 Florida District Court Order*". It should be noted that the *1960 Florida District Court Opinion* was the Opinion which Petitioners heretofore requested this Court to review by Petition for Writ of Certiorari, which was denied by this Court on February 20, 1961 (365 U.S. 811, 81 S. Ct. 690, 5 L. Ed. 2d 691). The instant Petition for Writ of Certiorari is ostensibly addressed to the *1961 Florida District Court Order*, but in actuality continually refers to the *1960 Florida District Court Opinion*.

In addition, the following definitions and abbreviations will also be used herein:

National Bank	The Coral Gables First National Bank
State Bank	Pan American Bank of Miami
Surety	American Surety Company of New York
Constructors	Constructors of Florida, Inc.
Trustee	John A. Nicholas, Trustee of Constructors of Florida, Inc.

Individuals	Richard R. Reynolds, Jim M. Lancaster, Jr., and Earl L. Goodwin
City	City of West Palm Beach, Florida, a municipal corporation
"Tr."	Transcript of testimony before the lower Court prior to being incorporated in the record on appeal
"Vol."	Volume of record on appeal in the District Court of Appeal of Florida, Third District
"R."	Page in the record on appeal in the District Court of Appeal of Florida, Third District
"PR."	The Partial Record filed by Petitioners in this Court
"Pl. Ex."	Banks' exhibits as introduced at the trial in the Circuit Court
"Def. Ex."	Exhibits of all other parties as introduced at the trial in the Circuit Court
"A."	The pages of the Appendix to this Brief

All emphasis has been supplied, unless otherwise noted.

II

THE OPINIONS BELOW

The *1961 Florida District Court Order*, which the Petition for Writ of Certiorari ostensibly seeks to have this Court review, is reported at 132 So.2d 806. The *1960 Florida District Court Opinion*, which is in reality the Opinion Petitioners seek to have reviewed, is reported at 119 So.2d 741. The Partial Final Decree of the Trial Court is

unreported. Copies of all of the aforegoing are appended hereto (A. 73, A. 16-30, A. 1-15).

III

JURISDICTION

The claimed jurisdictional requisites are set forth in the Petition; however, opposing the granting of the Writ, Respondents contend that the Petition is not timely; that the Order sought to be reviewed was based on an adequate, independent non-federal ground; and that the Petition fails to specify the raising or preservation of Federal questions. These contentions and our other argument in opposition to the Writ are more fully discussed hereinafter.

IV

QUESTIONS PRESENTED

When relieved of the strained semantics of the argument points by which Petitioners attempt to convert this case into one warranting review by this Court, it becomes at once apparent that the issues are relatively narrow. No amount of self-hypnotic repetition such as that attempted by Petitioners in their several argument points can remove from the case the basic issues, namely:

1. The usury penalties provided by the *National Banking Act* may be recovered against a National Bank by way of counterclaim.

2. The requirement, by the lender, that the borrower maintain substantial cash deposits under the joint control of the lender, makes the loan usurious if the interest actually reserved, charged, or taken by the lender amounts to more than legal interest on the sum actually available for the use of the borrower.

3. The loan of $442,400.00 (Pl. Ex. #6, A. 54-61), was usurious in its inception, in that the terms and conditions thereof require the borrower to maintain such substantial cash deposits with the lenders that the interest actually reserved, charged or taken by the lenders was in excess of Twenty-five (25%) percent of the sums actually available for the use of the borrower.

4. The note of $442,400.00 was void in its inception.

V

STATUTES INVOLVED

The pertinent provisions of the *National Banking Act* (12 U.S.C., §§ 85, 86) are set forth in the Appendix hereto (A. 67-69).

VI

SUMMARY OF THE CASE AND FACTS

The Petition for Writ of Certiorari seeks to have this Court review the *1961 Florida District Court Order* quashing Petitioners' (Appellants there) second appeal. Petitioners theretofore, by Petition to the Supreme Court of Florida for Writ of Certiorari, had requested review of the *1960 Florida District Court Opinion;* and the Supreme Court of Florida had refused such review. Petitioners likewise theretofore, by Petition to this Court for Writ of Certiorari, had requested this Court to review the *1960 Florida District Court Opinion*, and this Court had refused. After such refusals, the Florida District Court entered its Mandate; the Trial Chancellor, in conformity with the *1960 Florida District Court Opinion,* entered his Order and Judgment on Mandate; and Petitioners, Appel-

lants below, contending that the Chancellor's Order and Judgment on Mandate did not conform to the *1960 Florida District Court Opinion*, appealed to the Florida District Court for the second time. The Florida District Court, on motion of your Respondents (Appellees there), entered the *1961 Florida District Court Order* quashing Petitioners' said second appeal. It is the *1961 Florida District Court Order*, quashing their second appeal, which Petitioners now request this Court to review.

This matter arose in the Trial Court on the joint complaint of Petitioners seeking to collect upon several promissory notes and to foreclose several mortgages. Defendants counterclaimed, alleging that the transactions were usurious and involved tortious breach of contract. The Courts below found the transactions to be usurious and assessed appropriate penalties. The various claims, counterclaims, and cross-claims below are more fully explained in the Statement of the Case (VIII hereof, at page 10).

The Transcript of Record in the Trial Court consists of some one thousand nine hundred twenty-five (1925) pages, and includes the testimony of some twenty-four (24) witnesses. Ninety-seven (97) exhibits were received in evidence. All of the facts developed by this testimony and these exhibits have been summarized and cross-referenced to the voluminous Record and Exhibits by our Statement of Facts (IX hereof, at page 14). This Transcript of the Record in the Trial Court has not been certified to this Court nor, for that matter, has the Transcript of Record in connection with Petitioners' first appeal to the Florida District Court been certified to this Court. We have nevertheless cross-referenced our Statement of Facts to the Transcript of Record in the Trial Court, in order to comply with what we understand to be the intent of this Court's rules of procedure.

Briefly, the evidence proved that Petitioner-State Bank, in an attempt to avoid the usury penalties provided by the Laws of the State of Florida, made a usurious loan using as a conduit its agent, National Bank. Both banks were owned and controlled by the same family interests and had a majority of interlocking officers and directors. The device by which usury was perpetrated was that of requiring the borrower to leave on deposit with the National Bank such substantial funds that the interest paid, when computed upon the basis of the funds actually available to the borrower, was in excess of fifty (50%) percent. *The Chancellor below, after finding the facts to be* as above stated, interposed against both Banks usury penalties under State law. On appeal, the Florida District Court, by the *1960-Florida District Court Opinion*, affirmed the usury penalty imposed against the State Bank but modified the usury penalty imposed against the National Bank, so as to comply with Federal law (*12 U.S.C. §§ 85, 86*). Thereafter, Petitions for Writ of Certiorari were denied both by the Supreme Court of Florida and by this Court; the Order and Judgment on Mandate was entered by the Chancellor; Petitioners filed their second appeal; the *1961 Florida District Court Order* quashed said second appeal; and the Supreme Court of Florida again denied Certiorari.

VII

SUMMARY OF ARGUMENT IN OPPOSITION

In opposition, Respondents contend that *the Petition is not timely*. Petitioners should have come directly to this Court from the Florida District Court, because, under the *Constitution of the State of Florida, Article V, Section 4*, there is no discretionary right of review on the part of the

Supreme Court of the State of Florida. Thus, the Petition for Writ of Certiorari filed by Petitioners with the Supreme Court of Florida was a nullity and did not have the effect of tolling the statutory ninety (90) day period allowed for seeking a review by this Court. The time began to run on May 25, 1961, with the filing of the *1961 Florida District Court Order.*

The order sought to be reviewed was based on an adequate and independent non-federal ground, and for that reason alone the petition should be denied.

The Petition is fatally defective inasmuch as it does not properly specify the raising or preservation of Federal questions. Not only is the Petition itself defective in this respect; Petitioners further have failed to file a complete Transcript of Record as required by *Rule 21 (1) of this Court's Rules of Practice* (see Certificate of Clerk of District Court of Appeal of Florida, Third District, A. 63). The fragmentary Transcript of Record filed herein does not even include the Assignments of Error which were the basis for the first appeal resulting in the *1960 Florida District Court Opinion,* and there is, accordingly, no way in which this Court could determine whether or not Federal questions were properly raised and properly preserved.

There is not even an inference of any Federal question having been raised as to the State Bank. The petition is an attempt, on the part of the State Bank, to ride into this Court on the coat tails of a fictitious error as to the National Bank.

The decision below is correct. Usury penalties provided by the *National Banking Act* may be recovered by counterclaim. *John R. Alley & Co. v. Federal National Bank of Shawnee,* (10th Cir. Ct. of Appeals, Jan. 13, 1942) 124 F.2d 995. The transaction was usurious because the

lender, although charging interest on the full amount of the loan, required a major portion thereof to remain in its possession and control. *91 C.J.S., Usury*, § 35 (d), 616; *55 Am. Jur., Usury*, § 15, Page 334; *Planter's National Bank of Virginia* v. *Wysong & Miles Company et al.*, 177 N.C. 380, 99 S.E. 199, 12 A.L.R. 1412, writ of certiorari denied in 250 U.S. 665, 40 S. Ct. 13, writ of error dismissed 251 U.S. 568, 40 S. Ct. 343; *East River Bank* v. *Hoyt*, 32 N.Y. 119; *Mindlin* v. *Davis*, (S. Ct. of Fla., 1954) 74 So.2d 789; *Crompton* v. *Smith*, 140 Fla. 511, 192 So. 186; *Purvis* v. *Frink*, 57 Fla. 519, 49 So. 1023; *Wilson* v. *Conner*, 106 Fla. 6, 142 So. 606; *Carr* v. *Cole*, 119 Fla. 260, 161 So. 392; *Chakford* v. *Sturm*, (Fla., 1953) 65 So.2d 864; and *Opinion of Comptroller of Currency, No. 9530* (See A. 70).

There is no conflict of decisions. The purported conflict raised by Petitioners is non-existent. Numerous Florida cases have held that where a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter renewal or substituted contract. *Carter* v. *Leon Loan & Finance Company*, 146 So. 664; *Clark* v. *Grey*, 132 So. 832; *Wenck* v. *Insurance Agents Finance Corporation*, 99 So.2d 883.

There is no important question of Federal Law. Petitioners verbosely argue that the decisions below interfere with National Banks, implying their actions to have been normal and customary practice; however, they fail to cite any authority whatsoever for their proposition that the exacting of criminal usury is a normal and customary act of a National Bank—or, for that matter, of any other Bank. Surely this Court will be no more swayed by such an argument than was the United States Court of Appeals, Fifth Circuit, in *Daniel* v. *First National Bank of Birmingham*, (U.S. Ct. App. 5th Cir., January 17, 1956) 228 F.2d 803.

The Petition should be denied.

VIII

STATEMENT OF THE CASE

The statement of the case presented by Petitioners fails to make plain that their Petition for Writ of Certiorari is addressed to an Order of the Florida District Court, quashing an Interlocutory Appeal (PR. 230, A. 73), which said Order is referred to herein as the *"1961 Florida District Court Order"*. Petitioners, appellants below, had sought to appeal an order entered by the Trial Chancellor pursuant to a prior Opinion and Mandate of the District Court of Appeal of Florida, Third District (119 So.2d 741, PR. 22-43, A. 16-30). This prior Opinion of the District Court of Appeal of Florida, Third District, which Opinion is hereinafter referred to as the *"1960 Florida District Court Opinion"*, had theretofore been the subject of two (2) appeals and five (5) Petitions for Writ of Certiorari filed in the Supreme Court of Florida, all of which were denied (123 So.2d 349, 123 So.2d 676, 123 So.2d 677); and one (1) prior Petition for Writ of Certiorari filed in this Court, which this Court denied on February 20, 1961 (365 U.S. 811, 81 S. Ct. 690, 5 L.Ed. 2d 691). Thus, the only question before the Florida District Court was whether or not the Chancellor had complied with the *1960 Florida District Court Opinion;* and when that Court filed the *1961 Florida District Court Order* quashing Petitioners' (Appellants there) appeal, it of necessity indicated its belief that the Trial Court had followed its prior directions contained in the *1960 Florida District Court Opinion*, and that Petitioners' appeal was, on its surface, without merit.

Because this is Petitioners' second attempt to cause this Honorable Court to review the proceedings in the Trial Court, it is necessary for us to be somewhat repetitious of our Brief in Opposition which was previously filed before

this Court in Case No. 559 (Petition for Writ of Certiorari denied February 20, 1961, 365 U.S. 811, 81 S. Ct. 690, 5 L. Ed. 2d 691). For a correct Statement of the nature of the Case and the manner in which it arose, we again adopt that set forth in the Chancellor's Partial Final Decree (R. 1814, A. 1):

> "On September 20, 1957, the Coral Gables First National Bank, and the Pan American Bank of Miami, as Plaintiffs, filed their Bill of Complaint against Constructors of Florida, Inc., City of West Palm Beach, American Surety Company of New York, Richard R. Reynolds, Jim M. Lancaster, Jr., Earl L. Goodwin, Island Construction Company, Pecon Construction Company, J. C. Bledsoe, Russell A. Ortmayer, Harold S. Flagg, Tom Maxey, and the United States of America, as Defendants, seeking to foreclose three (3) chattel Mortgages, in the amount of $13,888.95, $92,690.85, and $151,802.46, and to impose liability for any deficiency on American Surety Company of New York and the City of West Palm Beach.
>
> "All defendants who were served with process filed their answers denying liability; and, in addition, setting up counterclaims against the Banks.
>
> "Constructors of Florida, Inc., and Messrs. Reynolds, Lancaster, Goodwin, by their counterclaim, alleged that the larger of the three (3) loans sought to be foreclosed, in the original principal amount of $442,400.00 was in fact usurious; that the Banks breached their contract to loan money to Constructors of Florida, Inc., by withholding from Constructors of Florida, Inc., the major portion of the proceeds of said larger loan; and that by said breach the Banks impaired the working capital of Constructors of Florida, Inc., thus ruining Constructors of Florida, Inc., and causing substantial damages; moreover, that the Banks, as a part of their conspiracy and scheme to collect usurious interest, caused Messrs. Reynolds, Lancaster, and Good-

win to decline a bona fide offer to purchase forty (40%) percent of the stock of Constructors of Florida, Inc., for the sum of $400,000.00, all to the damage of Constructors of Florida, Inc., and its principals, in the amount of $3,674,480.76 as to the corporation, and $2,342,379.19 as to its principals.

"American Surety Company of New York, in addition to adopting the allegations of the counterclaim filed by Constructors of Florida, Inc., and its principals, also by its counterclaim, alleged fraud and deceit on the part of the Banks, in that the Banks gave to American Surety Company of New York false and fraudulent information concerning the financial condition of Constructors of Florida, Inc., which information American Surety Company of New York believed and acted upon, thus causing American Surety Company of New York to refrain from taking action to prevent losses on its then outstanding bonds, and, further causing American Surety Company of New York to write additional bonds on the strength of the credit and quick assets of Constructors of Florida, Inc., all to the damage of American Surety Company of New York in the amount of $1,367,379.19.

"The City of West Palm Beach, in its counterclaim, adopted the factual allegations of the counterclaims filed by the other defendants and counterclaimants, and alleged that the actions of the Banks were the direct and proximate cause of the City's being forced to take over the contracts held by Constructors of Florida, Inc., with the City of West Palm Beach, all to the damage of the City of West Palm Beach in the amount of $279,423.58.

"John Nicholas, as Receiver in Bankruptcy of Constructors of Florida, Inc., was allowed to intervene by the Court and filed his answer and counterclaim against the Plaintiffs and adopted the pleadings, answer and counterclaim filed in the cause on behalf of Constructors of Florida, Inc., together with answer

and counterclaims directed against the other Defendants.

"Pecon Construction Company and J. C. Bledsoe were never served with process.

"The trial of the first phase of the suit was limited to the 'primary' issues between the principal parties."

The Chancellor's partial final decree found the loan transactions to be usurious; imposed upon Banks usury penalties and compensatory damages totalling $413,214.37; found Banks to be unsecured creditors of Constructors, in the amount of $109,963.54; denied the remaining claims of Banks and the remaining cross-claims and counterclaims against Banks; and found for American Surety Company of New York, in its mortgage foreclosure action against Constructors, in the total sum of $1,439,816.77 (A. 1-15).

Appeals and cross-appeals were taken to the Florida District Court, resulting in the *1960 Florida District Court Opinion* (A. 16) affirming the holdings of the Chancellor in all major respects, but modifying so as to allow National Bank, pursuant to the *National Banking Act*, to recover its proportionate share of the unpaid principal amount. Petitions for Certiorari and appeals were then lodged in the Supreme Court of Florida, but, jurisdiction was denied and all were dismissed.

Thereafter, Petitioners filed their Petition for Writ of Certiorari in this Court, same being Case No. 559 of the October Term, 1960, and this Petition for Writ of Certiorari was denied by this Court on February 20, 1961 (365 U.S. 811, 81 S. Ct. 690, 5 L.Ed. 2d 691).

Petitioner-Banks then, for the first time, objected to the Trial Court that it had no jurisdiction (see Suggestion of Lack of Jurisdiction, PR. 128-160), and when their Sug-

gestion was overruled and the Chancellor entered his Order and Judgment on Mandate of April 14, 1961 (PR. 176-181), Banks interjected alleged and fictitious Federal questions by Assignments of Error, seeking to have the Florida District Court re-review the entire proceedings which had already been through so many appellate procedures. These fictitious assignments of error as to an alleged Federal question were to be a purely procedural attempt to gain the jurisdiction of this Court for the second time. They are not based on the record. The *1961 Florida District Court Order* very properly quashed Appellants' (Petitioners here) appeal on May 25, 1961 (PR. 230, 132 So.2d 806) and Petitioners filed another Petition for Writ of Certiorari in the Supreme Court of Florida. This was denied on July 24, 1961, Rehearing denied September 26, 1961 (PR. 301, 302, 133 So.2d 319). Petitioners then filed their second Petition for Writ of Certiorari in this Court. Although this *second Petition* in this Court ostensibly seeks review of the *1961 Florida District Court Order*, it actually seeks a review of the *1960 Florida District Court Opinion*;—actually seeks review of essentially the same matters and things sought to be reviewed by their first Petition for Writ of Certiorari, in Case No. 559.

IX

STATEMENT OF FACTS

In the petition filed herein, Petitioners have interspersed alleged statements of facts without reference to the source thereof as required by the *Rules of Practice of this Court*. Petitioners in fact have not supplied the Court with the complete transcript of the proceedings in the Courts below, as required by this Court's rules (see Certificate of Clerk of District Court of Appeal of Florida, Third District, A63). However, believing that this

Court will require Petitioners to present a complete transcript in the event this Court should be in any way inclined to exercise jurisdiction, we present now a summary of the record below, fully cross-referenced to such record by footnotes appearing at the end of this brief.

Constructors of Florida, Inc., a Florida corporation, was organized in early 1955, with Richard R. Reynolds, Jim M. Lancaster, Jr., and Earl L. Goodwin as principals. The organization was extremely successful, so much so that its gross income has been characterized as "meteoric"[1]; and as of early October, 1956, it was engaged in the completion of some eighteen (18) municipal, state, and federal governmental contracts throughout the State of Florida having a total value of about $3,800,000.00, with a conservatively estimated profit of more than $700,000.00.[2]

These contracts required a "retainage" of ten (10%) percent of the actual monies earned under the contract; and, further, there was frequently a thirty (30) to ninety (90) day lag in the collection of monies due over and above retainage, because of the time lag involved in the submission, approval, and payment of estimates.[3]

Such retainage, and such accounts receivable build-up, were the prime factors in creating a need by Constructors for large amounts of working capital. Accordingly, the principals, working with their certified public accountant, Robert E. Lawrence, and with their attorney, William A. Pallot, discussed the feasibility of a public issue of stock. Their accountant, Mr. Lawrence, made certain contacts and investigations in this regard, and a suggested public offering prospectus was prepared for consideration.[4]

However, the thought of public sale of securities was dropped when Mr. Lawrence and Mr. Pallot conveyed to the principals a firm offer from an outside party to pur-

chase forty (40%) percent of the capital stock of the corporation for the sum of $440,000.00, of which $400,000.00 would have been paid into the treasury of Constructors.[5] Had this been done, the book net worth of the corporation, exclusive of provisions for income taxes estimated to be due in later years, and exclusive of provisions for profit sharing funds, would have been $842,996.67.[6] The transaction also would have affirmatively established the market value of the stock of the corporation at $1,000,000.00; and the offer of $400,000.00 net to Constructors for forty (40%) percent of the stock affirmatively established the market value of the stock held by Messrs. Reynolds, Lancaster, and Goodwin to have been at least $600,000.00.[7]

The principals requested time to consider the offer, and discussed it with their bank.[8] The Coral Gables First National Bank at Coral Gables, Florida, one of the Sottile chain of banks. At that time—early November, 1956—Constructors was indebted to The Coral Gables First National Bank on account of the remaining principal balance of two (2) equipment payment consolidating loans made in July, 1956, in the amounts of $19,443.53[9] and $129,767.19,[10] or a total of $149,211.72. National Bank, by its vice-president, Mr. George Riley, showed great interest in the corporation, and advised Messrs. Reynolds, Lancaster, and Goodwin that the proposed sale should not be consummated, because the Bank would loan Constructors up to one million dollars at five (5%) percent per annum.[11] Mr. Riley also stated that there was no reason to let someone else buy into their corporation; and as evidence of the National Bank's intentio , a $60,000.00 interim loan was granted to Constructors on November 6, 1956,[12] with the understanding that as soon as certain details could be worked out, a much larger loan would be forthcoming. This interim loan was "secured" by a corporate resolution directing the City of West Palm Beach to mail checks due to Constructors to The Coral Gables First National Bank.[13]

Based on these assurances and representations from the Bank, Constructors declined the offer of $400,000.00 net for forty (40%) percent of the stock of the corporation, and relied on the Bank for the working capital necessary to operate its business.[14]

The principals had indicated to Mr. Riley, vice-president of National Bank, that the approximate current need was $450,000.00; and had given to Mr. Riley complete data as to the status of the corporation, including the various contracts then held by the corporation.[15] Mr. Riley suggested that the loan be in the amount of $442,400.00, which was seventy (70%) percent of the total of the two (2) contracts, numbers seven (7) and nine (9), held by Constructors of Florida, Inc., with the City; and that the collateral be mortgages on certain equipment on which the Bank already had mortgages, together with other equipment which was not encumbered. Since it was then felt that these contracts were not assignable, Mr. Riley also desired that the corporate resolution, directing the City to mail to the Banks the checks payable to Constructors, remain in effect.[16]

Mr. Riley further suggested that the note be a long term note, so that the "bonding power" of Constructors would be increased; and said that the cost to Constructors would be only five (5%) percent per annum.[17] Accordingly, the loan was entered into on November 14, 1956, in the principal amount of $442,400.00, repayable at $3,000.00 per month principal, plus interest at five (5%) percent per annum, for twenty-three (23) months, and with a balloon or final payment, on the twenty-fourth (24th) month, of $373,400.00 plus interest at five (5%) percent per annum.[18]

Although not then known to Constructors, a loan in this amount was beyond the legal lending limits of National Bank, since its limit was $200,000.00.[19] However, it was

generally understood by all member banks of the Sottile Chain, including The Coral Gables First National Bank and Pan American Bank of Miami, a State Bank, both of whom had a majority of interlocking directors, that in the event one of such Banks was called on for a loan in excess of its limits, another would participate therein.[20] Such participations were generally arranged, prior to the actual extension of credit by the originating member Bank.[21]

As the Chancellor said in his Partial Final Decree, at Page 6 (R. 1816, A. 1-A. 15) footnotes being ours:

> "As of November 14, 1956, Constructors of Florida, Inc., was indebted to Coral Gables First National Bank in the amounts of $19,444.53[22] and $129,767.19,[23] the unpaid balances then due on the equipment notes dated July of 1956, and in the amount of $60,000.00 on the interim loan. $202,562.38 was actually paid to Constructors of Florida, Inc., on account of the $442,400.00 loan of November 14, 1956,[24] so that the actual net cash which had been paid over to Constructors of Florida, Inc., by Coral Gables First National Bank, as of November 14, 1956, was $411,774.10.[25] However, Pan American Bank of Miami, as participant in each of these three (3) loans, was debited by Coral Gables First National Bank with the sums of $19,444.53, $129,767.19, and $243,320.00, or a total of $392,531.72.[26] Actually, therefore, *Coral Gables First National Bank was merely a conduit, and agent*; the new loan of $442,400.00 did not, according to the books and records of Coral Gables First National Bank, increase the net amount of the indebtedness of Constructors of Florida, Inc.; rather the net amount of indebtedness to Coral Gables First National Bank, after the new loan of $442,400.00, actually decreased from $209,211.62 to $19,242.38, a net decrease of $188,969.24. In other words, immediately prior to the consummation of the alleged $442,400.00 loan on November 14, 1956, Constructors of Florida, Inc., was indebted to Coral Gables First National Bank in the amount of $209,211.62; im-

mediately after the consummation of the alleged $442,400.00 loan, Constructors of Florida, Inc., was indebted to Coral Gables First National Bank only in the small amount of $19,242.38. *By loaning* $393,531.72 *of the money of Pan American Bank of Miami, Coral Gables First National Bank decreased its outstanding loans by* $188,969.24."[27]

In accordance with the discussions, and in accordance with Mr. Riley's request, the note was secured by a chattel mortgage covering not only all of the equipment previously mortgaged to National Bank, but also some additional equipment. Also National Bank held the resolution directing the City to mail checks payable to Constructors in care of the Bank, so that the Bank could be sure that it collected each monthly payment due. The Coral Gables First National Bank was to have each month $3,000.00 plus five (5%) percent per annum interest; *and the balance was to go into the general account of Constructors for its use.*[28] There was no knowledge, agreement, or understanding, at that time, of any discount, commitment fee, or other charge other than the five (5%) percent annual interest stated on the face of the note, or of any other terms varying in any way from the face of the note, except that the interim loan was to be repaid out of the proceeds.[29]

Nevertheless, National Bank not only deducted the amount necessary to repay the interim loan, but also paid itself $44,240.00 as a commitment fee and $44,854.44 as discount, or interest paid in advance. $90,743.18 was deposited in a new account called "Collateral Account No. 1."[30] This was later discovered to be a controlled account, which could not be used by Constructors since it required the signature of Mr. Riley, as vice-president of the Bank, on all checks.[31] Only $203,000.00 was actually credited to the regular checking account of Constructors at that time.[32]

These unauthorized charges were called to the attention of the principals of Constructors by means of a letter addressed to Constructors by Mr. W. T. Klug, another vice-president of National Bank, under date of November 14, 1956.[34] Mr. Lancaster and Mr. Goodwin immediately called on Mr. Riley for an explanation of the apparent shortage of about $90,000.00.[35] Mr. Riley explained that there was an error in making the charge of $44,854.44, and that it would be reversed. He further stated that the charge of $44,240.00 would be treated as pre-paid interest, that is, five (5%) percent per year for two (2) years, or a total of ten (10%) percent, and that there would be no other charges.[35] He also said that the purpose of Collateral Account No. 1 was to hold the loan proceeds that Constructors did not need at that time, in order to save interest, and that the amounts in this account would be available whenever needed.[36] Constructors nevertheless discovered, at a later date, not only that the sums in Collateral Account No. 1 were not freely available, but also that they were charged interest even on the sums which had been withheld by the Bank in this account.[37]

Shortly after the conversations resultant from Mr. Klug's letter, and when Constructors needed some additional money out of the amounts retained in Collateral Account No. 1 by National Bank, Mr. Riley set up "Collateral Account No. 2", *which he stated to be primarily for bookkeeping reasons and, like the other collateral account, to make Constructors' balance sheet look better so that they could obtain additional bonding power. Like Collateral Account No. 1, this new collateral account was also controlled by the Bank*, and required the signature of the Bank's vice-president, Mr. Riley, together with that of an officer of Constructors in order to transfer monies therefrom.[38]

Mr. Riley said that the checks which came in from West Palm Beach would be deposited to the credit of this

new "Collateral Account No. 2", so as to keep track of them; that the payments required each month on the $442,400.00 loan would be made from this account; and that the remainder would be available to Constructors. On this basis, Constructors allowed Collateral Account No. 2 to be instituted.[39]

The principals of Constructors then felt that their working capital needs had been solved by the long term note for $442,400.00, particularly since they had also been informed that the amount could be considered as a "revolving working capital fund",[40] and could be maintained at the level of between $400,000.00 and $1,000,000.00, by similar arrangements on then contemplated additional jobs.[41]

During the months of December, 1956, and January, 1957, the affairs of Constructors appeared to progress well. From time to time, the principals called upon Coral Gables First National Bank to release to their use certain of the funds held by the Bank in Collateral Account No. 1; these requests were granted, and the entire amount originally withheld in Collateral Account No. 1 was paid over to Constructors by January 7, 1957.[42] Of course, the amounts held in Collateral Account No. 2 were building up at the same time; and, although the principals of Constructors did not realize it, Bank was actually allowing them to use little or no more out of Collateral Account No. 1 than what the Bank had already received and deposited in Collateral Account No. 2. This account, by the end of January, 1957, had a net balance of $122,749.34,[43] and by the end of February, 1957, a net balance of $179,540.67.[44]

During this time, it became apparent to the principals of Constructors that Constructors would need the use of some of its money which the Bank was holding in Collateral Account No. 2, and requests were made for $100,000.00 of that money to be released.[45] Mr. Riley continually in-

dicated that this could be worked out; however, no money was forthcoming.[46] Finally, Mr. Riley suggested that a smaller amount be requested, and the request was reduced to $50,000.00, which was the approximate amount needed to cover anticipated payrolls which would be due to be paid before other anticipated collections would be available.[47]

Even the requests for $50,000.00 were not granted, and finally, in desperation, Mr. Reynolds made formal written request on March 4, 1957.[48] Mr. Riley indicated that the request would be granted; and *asked that Mr. Goodwin leave a signed check*, since Mr. Goodwin had to be out of town, for Mr. Lancaster to get the next day.[49] Mr. Goodwin left such a signed check, in blank and undated, with the understanding that Mr. Riley would get approval for a release of approximately $50,000.00 of the funds of Constructors held by Bank in Collateral Account No. 2, fill in the check for that amount, and deliver the proceeds thereof to Mr. Lancaster.[50] *Instead, the check was filled in for the amount of $179,540.67, the total amount remaining in Collateral Account No. 2, and this sum was applied, on March 7, 1957, without the knowledge or consent of any one of the principals of Constructors, to the reduction of the face amount of the $442,400.00 loan.*[51] As a matter of fact, the principals were not aware of this unauthorized action until after April 3, 1957, when the check was forwarded as having been omitted from a bank statement.[52] Actually, no statements of either collateral account were ever forwarded to Constructors, but were held by Mr. Riley of the Bank; *moreover, the applied amount of $179,540.67 is in excess of the total amount due on all three (3) notes as of the date of the trial of this cause, May 1, 1958, so that none of said notes, as of the date of the trial, were in default.*[53]

Shortly after the unauthorized application of the $179,540.67, in March of 1957, or while it was in the process of being made, but long prior to any knowledge of same

by the principals, a conference was held at which the matter of advances was discussed. At this meeting there were present Mr. Eduardo Morales, Mr. Riley, Mr. H. P. McGoogan, Messrs. Reynolds, Lancaster, and Goodwin, Mr. Harold S. Flagg, and Mr. James Sottile.[54] The question of release of some portion of Constructors' fund was discussed. Mr. Morales, executive vice-president of Pan American Bank of Miami, presided. His presence was explained on the ground that Pan American Bank of Miami actually had the controlling authority on the loan, inasmuch as it had advanced most, if not all, of the funds actually released to Constructors.[55]

At this conference, the principals of Constructors were requested to sign personal guaranty agreements, and they complied with this request,[56] not knowing that at that very time the Bank had applied, or was in the process of applying, the total balance of $179,540.67 to reduction of the principal amount of the $442,400.00 loan.[57] It later developed that these personal guarantee agreements had been erroneously prepared by the Bank, and corrected ones were requested, to which reference will later be made.[58] The request for use of some of Constructors' funds, held by the Banks in Collateral Account No. 2, was not granted; however, neither was it specifically denied. Rather, Mr. Morales requested that a letter be obtained, from Surety, explaining the position of the Surety Company.[59]

The Banks' failure to live up to their promises and contract caused the cash position of Constructors to become precarious. Payrolls were imminent, with no readily available source of funds to meet them. Messrs. Reynolds, Lancaster, and Goodwin, therefore, requested that Mr. Harold Flagg and Mr. Tom Maxey proceed to New York and present the matter to Surety, in the hope that Surety would, so to speak, come to the rescue of Constructors.[60]

Mr. Maxey, an attorney, accountant, and tax expert, had been engaged by Constructors in mid-October of 1956. At that time, based on what they understood their statement of September 30, 1956, would show, the principals of Constructors were much concerned over the potential Federal Income Tax liability on the work already completed. Mr. Maxey's engagement was as a tax counsellor, and he undertook to advise Constructors as to ways and means of minimizing such taxes,[61] which, according to the audit report of Mr. Lawrence, submitted on October 29, 1956, as of September 30, 1956, were estimated to amount to $175,507.94 for the profits then earned.[62]

When the cash position of Constructors became tight, due to the Banks' violating their original agreement with Constructors, during the latter part of February, 1957, the principals of Constructors requested Mr. Maxey to look into the matter of the disposition of the proceeds of the loan of $442,400.00 made to them on November 14, 1956.[63] Mr. Maxey complied with their request, and was accordingly familiar with the transactions which had taken place. He had had conversations with the various officers of the Bank, while he was attempting to trace the proceeds of the loan; and later, immediately prior to his trip to New York with Mr. Flagg, he had been requested by Mr. Morales, executive vice-president of Pan American Bank of Miami, to obtain from the Surety a letter setting forth its position as to the loan in question.[64]

Mr. Maxey and Mr. Flagg flew to New York, and advised the officers of Surety of the problems then facing Constructors. As a result of this information, Mr. Frederick A. Carroll, Assistant General Counsel of Surety, returned to Miami with Mr. Maxey to attempt to work out a solution of the problems.[65]

On arrival in Miami, Mr. Carroll dictated the letter of March 12, 1957, to The Coral Gables First National

Bank, and meetings were held at the Pan American Bank of Miami in connection with the problems.[66] At the first of these meetings, Mr. Morales and Mr. Carroll discussed the meaning of the latter portion of the letter of March 12, 1957;[67] and Mr. Carroll confirmed Mr. Morales' belief that said letter offered no protection to the Bank in the event Constructors failed to complete Contracts 7 and 9 with the City according to their terms.[68] Also, Mr. McGoogan was informed that the Banks had no right, in Mr. Carroll's opinion, to demand that the City pay over to the Banks the amounts then computed to have been earned by Constructors on estimates submitted to the City,[69] unless Surety agreed, because of the Bond application and the general agreement of indemnity which preceded the writing of the West Palm Beach bond.

The question of the interest which had been charged by the Banks was discussed, as were various other matters connected with the loan. Mr. Riley represented to Messrs. Maxey and Carroll that the major portion of monies actually advanced by the Banks to Constructors had been used in connection with West Palm Beach Jobs Number 7 and Number 9;[70] based on this representation and believing Mr. Riley, who at that time was a vice-president of the Bank, it seemed to Mr. Carroll and to Mr. Maxey that there was enough still remaining available from these two (2) jobs to pay the Banks in full and to complete the jobs. Accordingly, the tentative procedure later embodied in the agreement of March 20, 1957,[71] was discussed; and it was agreed that out of the remaining amounts to be collected on the West Palm Beach Jobs 7 and 9, approximately sixty-five (65%) percent would go to retire the indebtedness to the Banks, and approximately thirty-five (35%) percent would be deposited in a trust account requiring the countersignature of a representative of the Surety and a representative of Constructors. Mr. Maxey and Mr. Roman,

one of the attorneys for Pan American Bank of Miami, were directed to prepare an agreement for execution by The Coral Gables First National Bank and by Constructors.[72]

Mr. Carroll also conferred with the principals of Constructors, and reached certain agreements with them as a result of which the Loan Agreement[73] and Trust Agreement[74] of March 15, 1957, were prepared and executed.

Mr. Maxey and Mr. Roman, in the meantime, prepared the Loan Repayment Agreement of March 20, 1957, and a meeting was held at The Coral Gables First National Bank on March 20, 1957, for the purpose of execution of this agreement and the Renewal Contract Note of even date.[75] *At that time Mr. Roman produced the Usury Release and insisted on its being signed; otherwise, the Banks would not accept the Loan Repayment Agreement.*[76] The principals of Constructors, knowing that unless they complied with this request, they would get no portion of the monies then estimated to be available from the City, and knowing that unless some arrangement was made with the Banks, Constructors would be forced to default on this and on other jobs, executed the requested Usury Release.[77] At the same time, Mr. Riley insisted on obtaining corrected personal guarantees to replace those taken on March 6, 1957, and, under the same compulsion, the principals of Constructors executed the guarantees of March 20, 1957.[78]

The Chancellor found that the said Loan Repayment Agreement, the said personal guarantees, and the said Usury Release, all were void on account of duress, fraud and deceit practiced by Banks on the parties thereto.

Banks contended that the entire funds collected from West Palm Beach were to be held in Collateral Account No. 2.[79] If this is so, and based on the fact that Contracts 7 and 9, by their terms, were to be completed within 240 days[80] from August 29, 1956, the Banks must have antici-

pated collecting, and holding without the consent of Constructors, within six (6) months after the date of the loan, more than enough to repay it. In other words, using these facts, the Banks reserved, charged, or took[51] $85,029.92[52] as interest, on a loan which they expected to collect within six (6) months, which amounts to approximately forty-two and 66 100ths (42.66%) percent[53] per annum on the amount of $398,160.00 claimed to have been disbursed by the Banks, and approximately thirty-eight and 40/100th (38.40%) percent[54] per annum on the $442,400.00 original principal amount of the note. As the Chancellor said:

> "It appears that under any lawful and reasonable contention the Banks charged Constructors of Florida, Inc. at least thirty-eight and 40 100ths (38.40%) percent interest on the $442,400.00 loan and fifty-six and 27 100ths (56.27%) percent if you use only the actual amount of the said loan which was made available to the uncontrolled account of Constructors of Florida, Inc. It seems without question that the interest charged and reserved exceeds twenty-five (25%) percent per annum." (Partial Final Decree, R. 1821, A. 1-A. 15).

The City had no notice whatsoever of the Loan Repayment Agreement of March 20, 1957,[55] *and did not even know that such an agreement existed until many months after its execution.* The City, therefore, continued to make payments of estimates of work done by Constructors until August of 1957, when pressure due to unpaid job bills and due to a certain lawsuit previously filed by Marion V. Crotty, Inc., to which the City, Surety, and Constructors had been made parties, caused the City to notify Constructors, by letter dated August 20, 1957,[56] that unless Constructors made payment of its various bills, the City would enforce the take-over provisions of its contracts with Constructors of Florida, Inc. As of the take-over date, the Banks had collected out of the City jobs No. 7 and No.

9, after the March 0, 1957, agreement,[87] the total sum of $71,843.26; and the total amount collected by Banks from said sewer jobs and withheld from Constructors was $265,999.27.

Constructors had no funds with which to comply with the City's demands and the City was forced to resort to the take-over provisions of the contracts.[88] As a result thereof, no further payments were made by the City to the Banks, and the Banks thereafter instituted the action which ultimately resulted in the Partial Final Decree of June 26, 1958 (R. 1821, A. 1-A. 15); in the *1960 Florida District Court Opinion;* and in the *1961 Florida District Court Order.*

X

ARGUMENT IN OPPOSITION

A. The State Court Judgment Is Based upon an Adequate and Independent Non-Federal Ground.

This Court has consistently adhered to the principle that it will not review a State Court judgment based upon an adequate and independent non-Federal ground, even though a Federal question be involved and perhaps wrongly decided. *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Berea College* v. *Kentucky*, 211 U.S. 45, 53; *Fox Film Corp.* v. *Muller*, 296 U.S. 207.

The *1961 Florida District Court Order*, which Petitioners seek to have this Court review, is based upon an adequate and independent non-Federal ground. It must be remembered that the order sought to be reviewed is an order quashing Petitioners' second appeal to the Florida District Court. This order was entered pursuant to the motion of Appellees (Respondents here) to quash appellants'

(Petitioners here) appeal. This motion, which was filed May 9, 1961, appears at pages 203 to 223 of the fragmentary record filed by Petitioners in this Court. We there argued that the only question which could possibly be presented to the Florida District Court by Petitioners' second appeal was that of whether or not the Chancellor, in his Order and Judgment on Mandate of April 14, 1961 (PR. 176 to 181) complied with the prior *1960 Florida District Court Opinion* and its Mandate thereon (PR. 42-43). We reminded the Florida District Court, in our Motion, that by its 1960 Opinion it had affirmed the Chancellor's original Partial Final Decree of June 26, 1958, modifying only as to findings on certain amounts, and giving specific directions as to how the said Partial Final Decree should be modified. We contended that the Florida District Court therefore could inquire only into whether or not the Chancellor's Order and Judgment on Mandate of April 14, 1961 (PR. 176) conformed to the *1960 Florida District Court Opinion*. We cited 2 *Fla. Jur., Appeals*, §406; *State* v. *Holt*, 117 So.2d 428; and *Palm Beach Estates* v. *Croker*, 152 So. 416 (Syllabus by the Court):

> "Where a decree has been affirmed and the merits of the cause passed on by this court, and such decree modified only as to certain amounts with specific instructions to the court below as to its modification, the merits of the cause will not again be considered. The court will determine only the question of a compliance with its mandate."

We reminded the Florida District Court of portions of its 1960 Opinion:

> "The Banks have urged other points for reversal and they have been duly considered, but found to be without merit." (119 So.2d at page 748)

We called the attention of the Florida District Court to the specific directions given the Chancellor by its *1960 Opinion*:

> "* * * since the record clearly demonstrates, and the chancellor found, that the borrower received at most approximately $263,000 from the loan of $442,400, it would follow that the State bank's participation in the funds actually made available to the borrower was in excess of 92% of the amounts loaned. Likewise, it follows that the National bank would have furnished slightly in excess of 7% of the original monies loaned. *A careful scrutiny of the proceedings that took place at the time of and subsequent to the making of the original loan indicates that by the device of participation, the State bank attempted to lend its funds through a chartered National bank without subjecting itself to the loss of its principal in the event that the loan was found to be usurious under § 687.07, Fla. Stat., F.S.A. The most that the State bank could lose* if this device was unsuccessful, using the National bank as its conduit, would be double the interest actually received by the National bank or a forfeiture of interest that was to accrue. In the final analysis, we conclude that the chancellor was correct in forfeiting interest due and unpaid as it applied to both the State and National banks, but that he was in error when he decreed a forfeiture of the entire amount of principal. Such portion of the remaining unpaid principal on the original loan, hereinabove noted to be approximately 7%, as had not been participated by the National bank to the State bank should have been reserved by the chancellor's decree to the National bank rather than forfeited." (119 S.2d 747, 748).

Did the additional findings of fact made by the Chancellor in his Order and Judgment on Mandate of April 14, 1961, comply with the aforegoing directions? The Florida District Court, in its *1960 Opinion* above quoted, found:

> "that the borrower received at most approximately $263,000 from the loan of $442,400." (119 So.2d 747).

The Chancellor's additional finding of fact was:

> "(a) The borrower, CONSTRUCTORS OF FLORIDA, INC., received on November 14, 1956, out of the proceeds of the loan of the same date, the sum of $262,562.38."

The *1960 Florida District Court Opinion*, hereinabove quoted, further found that:

> "* * * the State bank's participation in the funds actually made available to the borrower was in excess of 92% of the amounts loaned. Likewise, it follows that the National bank would have furnished slightly in excess of 7% of the original monies loaned. * * * Such portion of the remaining unpaid principal on the original loan, *hereinabove noted to be approximately* 7%, as had not been participated by the National bank to the State bank should have been reserved by the chancellor's decree to the National bank rather than forfeited." (119 So.2d at page 747, 748).

The Chancellor's Order and Judgment on Mandate, in strict compliance with the foregoing, found:

> "(b) Of the aforesaid amount actually received by the borrower, and by reason of the participation of the State Bank therein to the extent of $243,320.00, the National Bank advanced only $19,242.38, or 7.33% of the funds actually received by the borrower.
>
> "(c) That the principal amount due on the said note of November 14, 1956, as of the institution of this action, was $151,802.46; and that 7.33% of $151,802.46 is $11,271.20."

These additional findings of fact were strictly in accordance with the *1960 Florida District Court Opinion*. Similarly, that portion of the Chancellor's Order and Judgment on Mandate of April 14, 1961, which modified his prior orders, was in absolute compliance with the *1960*

Florida District Court Opinion. That Court, concluding its *1960 Opinion,* said at 119 So.2d 741, 749, that:

> "In the light of the views expressed, we conclude that the chancellor, in imposing against the National bank as a penalty, the forfeiture of a portion of the unpaid principal of $151,802.46 not participated to the State bank, committed error; that upon a remand of this cause, he should ascertain and determine this amount, and enter an appropriate decree reserving the same to the National bank."

The Chancellor, modifying his prior Partial Final Decree in strict compliance with the foregoing, said, in his Order and Judgment on Mandate of April 14, 1961 (PR. 176-181):

> "It is, therefore, ORDERED, ADJUDGED and DECREED that this Court's Partial Final Decree of June 26, 1958, as amended July 2, 1958, is modified in the following respects:
>
> "1. The sum of $11,271.20, being the portion of the unpaid principal not participated by the National Bank to the State Bank on the loan of November 14, 1956, is reserved to the National Bank; but the mortgage securing said obligation is void and unenforceable in these proceedings, as said Bank is not in equity with clean hands.
>
> * * *
>
> "OTHERWISE, said Partial Final Decree of June 26, 1958, as Amended July 2, 1958, is hereby re-affirmed and re-adopted, and remains in full force and effect."

When the Florida District Court entered its Order of May 25, 1961, quashing the appeal filed therein by Banks, that Court was sustaining our argument, presented in our Motion to Quash such appeal, that it had jurisdiction to inquire only as to whether or not the Chancellor's

Order and Judgment on Mandate of April 14, 1961, was in compliance with its *1960 Opinion*; and that, from the Record, it was obvious that the Chancellor's Order and Judgment on Mandate of April 14, 1961, was in absolute conformity with said *1960 Opinion*. Such being the case, the Florida District Court had no alternative but to quash the appeal; and that, not on any Federal ground whatsoever, but upon the adequate, independent non-federal ground recited in our motion to quash. The *1961 Florida District Court Order*, which is the order petitioners seek to have this court review by Petition for Writ of Certiorari, specifically states that the appeal was quashed after consideration of our Motion to Quash:

> "This cause having come on before the court on appellees' motion to quash interlocutory appeal and the court having considered same, it is ordered that said motion is granted and this interlocutory appeal from the Circuit Court of Dade County, Florida (Chancery No. 205613) be and the same is hereby quashed." (132 So.2d 806; PR. 230; A. 73).

We most respectfully contend that the granting of our motion to quash by an order reciting that the Court had considered same is an order approving the ground of our motion. Thus, the *1961 Florida District Court Order* was based on an adequate and independent non-federal ground.

The Petition, on this basis alone, should be denied.

B. The Petition Is Not Timely.

Briefly, it is the contention of Respondents that the Petition herein was not timely filed, in that more than ninety (90) days elapsed between the date of the *1961 Florida District Court Order* sought to be reviewed and the date of filing of the Petition.

The Order sought to be reviewed is the Order of the District Court of Appeal of Florida, Third District, en-

tered May 25, 1961, quashing Petitioners' (Appellants there) Interlocutory Appeal. The petition for certiorari herein was filed December 21, 1961, or 210 days after the order sought to be reviewed. It is true that Petitioners filed in the Supreme Court of the State of Florida a document entitled Petition for Writ of Certiorari, and Petitioners apparently contend this filing tolls their jurisdictional time within which to file a Petition for Writ of Certiorari in this Court. Such might be the case if the Supreme Court of Florida had the obligation to review the *1961 Florida District Court Order* or even if the Supreme Court of Florida had any discretionary power to review said order. The question, then, is whether or not the Supreme Court of Florida could have reviewed the *1961 Florida District Court Order* if it had desired so to do.

The answer is in the negative. The Supreme Court of the State of Florida has only that limited jurisdiction given to it by the *Constitution of the State of Florida, Article V, Section* 4, which provides in part:

> "Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or Federal Constitution. *The Supreme Court may review by certiorari any decision of a District Court of Appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the District Court of Appeal to be of great public interest, or that is in direct conflict with a decision of another District Court of Appeal or of the Supreme Court on the same point of law,* and may issue writs of certiorari to commissions established by law."

The Supreme Court of Florida has itself stated, in *Ansin v. Thurston*, (S. Ct. Fla., 1958) 101 So.2d 808, at page

810, that it has no overall discretionary power to exercise certiorari jurisdiction:

> "We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the District Courts of Appeal are limited and strictly prescribed. Diamond Berk Insurance Agency, Inc., v. Goldstein, Fla., 100 So.2d 420; Sinnamon v. Fowlkes, Fla., 101 So.2d 375. *It was never intended that the District Courts of Appeal should be intermediate courts.* The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, *with review by the District Courts in most instances being final and absolute.*"

The *1961 Florida District Court Order*, which Petitioners sought to have the Supreme Court of Florida review by writ of certiorari, and which Petitioners now seek to have this Court review by Petition for Writ of Certiorari, was an Order quashing Petitioners' (Appellants there) Interlocutory Appeal from the Order and Judgment on Mandate entered by the Chancellor pursuant to the prior Opinion of the District Court of Appeal of Florida, Third District. Under the law of the State of Florida, the only question which the Florida District Court could possibly have decided was whether or not the Chancellor's Order and Judgment on Mandate did conform to the *1960 Florida District Court Opinion*. (See discussion of this issue at Pages 28-33 of this Brief in Opposition.) This question is not within the Florida constitutional grants of discretionary certiorari

jurisdiction to the Supreme Court of the State of Florida, and the Supreme Court of the State of Florida accordingly could not have reviewed the *1961 Florida District Court Order*, even if it had desired so to do.

The Supreme Court of Florida's denial of the Banks' Petition for Writ of Certiorari was not a decision on the merits; neither was it a refusal to exercise a discretional jurisdiction. Indeed, it is difficult to conceive how Petitioners could possibly feel that the *1961 Florida District Court Order*, concisely quashing their appeal, affected a class of constitutional or State officers, or passed upon a question certified by the District Court of Appeal to be of great public interest, or was in direct conflict with a decision of another District Court of Appeal or of the Supreme Court on the same point of law; and these are the only Florida Constitutional bases for the exercise of discretionary jurisdiction by the Supreme Court of Florida.

Surely, the time for Petitioning the Supreme Court of the United States for Writ of Certiorari may not be extended *ad infinitum* by improvident requests to the Supreme Court of the State to take a jurisdiction which, by the Constitution of the State and by such Court's own decisions, it does not have. If the Supreme Court of Florida had discretionary jurisdiction, such as the Supreme Courts of the States involved in *Stratton* v. *Stratton*, (S. Ct. U.S. 1915) 239 U.S. 55, 60 L. Ed. 142, and *American Railway Express Co.* v. *Levee*, (S. Ct. U.S. 1923) 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140, then it might be that the Petition now before this Court would be considered as timely; but we emphasize that the theory involved is not comparable to that involved in *Stratton* v. *Stratton*, *supra*, and *American Railway Express Co.* v. *Levee*, *supra*, in both of which this Court pointed out that the Supreme Court of the state involved had *discretionary jurisdiction* to review the decision of the lower State Court.

The *1961 Florida District Court Order*, quashing Petitioners' appeal, was final and was not subject to a further review by the Supreme Court of Florida. We believe that we have demonstrated conclusively, and that the Record in this matter shows, that the adjudication of dismissal was not subject to further review by any State Court. In *Department of Banking* v. *Pink*, (S. Ct. U.S. 1942) 317 U.S. 264, 87 L. Ed. 254, this Court said that the test for determining finality was whether or not:

> "* * * the record shows that the order of the Appellate Court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a State Court (See Gorman v. Washington University, 316 U.S. 98, 86 L. Ed. 1300, 62 S. Ct. 962). Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the Appellate Court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

The time for petitioning this Court ran from May 25, 1961.

The defensive argument presented by Petitioners at Pages 8 to 11 of their Petition, apparently in anticipation of the fact that its timeliness would be questioned, is without merit. The authority upon which they rely, namely, *Bert Smith* v. *J. Turner Butler, et al., Trustee*, (1961) 81 S. Ct. 937, U.S. , 6 L. Ed.2d 184, is not comparable to the matter now before the Court, because in that case the second decision of the District Court of Appeal of Florida, Third District, *Smith* v. *Butler*, (1960) 118 So.2d 237, incorporated by reference its first decision, ~~and thus~~ *Butler* v. *Smith*, (1958) 104 So.2d 868, and thus presented a case which the Supreme Court of Florida had discretionary jurisdiction to review.

The Petition should be dismissed for lack of timely filing.

C. The Petition Fails to Specify the Preservation or Raising of Federal Questions.

It would appear from the Petition herein that Petitioners seek to invoke the jurisdiction of this Court on the basis of alleged Federal questions involving:

(1) The equal protection or the due process clause of the *Constitution of the United States*; and

(2) An alleged erroneous interpretation of a portion of the *National Banking Act* (12 *U.S.C.*, §§ *85, 86*).

The Petitioners have fully and completely failed to show the proper preservation of either of these Federal questions; indeed, their attempted showing (Petition, Page 25) demonstrates conclusively that the Federal questions were not properly raised or preserved. The Rules of this Court require the Petitioner to specify, in his Petition (*Supreme Court Rule 23(f)*):

> "* * * the stage in the proceedings in the court of first instance and in the Appellate Court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Petitioners' "specification as to the stage of the proceeding in the Court of first instance and in the Appellate

Court at which and the manner in which the Federal question sought to be reviewed was raised", appearing at Pages 25 through 27 of the Petition, affirmatively shows that the Assignments of Error relied upon by the Petitioners were filed in connection with their second appeal to the Florida District Court. This second appeal was quashed by the *1961 Florida District Court Order*. There is no showing of how the alleged Federal Questions were raised or presented in the Court of first instance or in connection with the first appeal.

There is no Record before this Court of the original proceedings in the Trial Court. There is no Record before this Court of the Assignment of Error by which Petitioners first brought this matter to the Florida District Court. There is no Record before this Court of Petitioners having raised any Federal question in connection with their first Petitions for Writs of Certiorari to the Supreme Court of Florida.

Indeed Petitioners' specification (See Petition, Page 26, second paragraph) indicates that they raised the Federal question before the Chancellor by Petition for Rehearing in connection with his Order of April 14, 1961. This is the first reference Petitioners make to any portion of the Record before this Court which would even remotely indicate the raising or preserving of a Federal question. We believe it to be settled law that Petitioners must show, in accordance with the rules of this Court, that the Federal question was raised at the first opportunity; and that, of course, would have been during the trial proceedings, or at least during the first appeal.

No portion of the Record of the trial proceedings, or even of the first Appellate proceedings or certiorari proceedings having been certified to this Court in connection with this proceeding, it follows that the Petitioners have failed to comply with the rules of this Court.

The Order which Petitioners seek to have this Court review is merely an order quashing their appeal. It does not in any way refer to any Federal question; indeed, the Florida District Court could not have decided any Federal question. As has been heretofore shown herein (See Section X, Part A, pages 28-33 hereof) the Florida District Court had jurisdiction only to determine whether or not the Order entered by the Chancellor on April 14, 1961 (PR. 176-181), complied with the prior *1960 Opinion of that Court*.

1. The Constitutional Question.

As heretofore stated, there is no mention of any constitutional issue in the *1961 Florida District Court Order* quashing Petitioners' appeal. Neither is there any mention of any constitutional issue in the *1960 Florida District Court Opinion* (PR. 22-41, A. 16-30). Their Petition for Writ of Certiorari filed in the Supreme Court of Florida on June 8, 1961 (which was actually their third Petition for Writ of Certiorari in the Supreme Court of Florida) (PR. 231-300), does not contain any Federal Constitutional argument. It is therefore most respectfully contended that this Honorable Court is without jurisdiction to review any claimed Federal constitutional questions.

2. The National Banking Act.

As to the *National Banking Act*, Petitioners seemingly contend, (1) that the usury penalties thereby provided cannot be recovered by way of counterclaim; (2) that the Chancellor and the District Court of Appeal erred in their calculations as to the interest paid to Petitioners.

Petitioners have failed to show how the Florida District Court, by its 1961 Order quashing Petitioners' appeal, in any way passed upon these questions. Petitioners do cite certain Assignments of Error which the Florida District

Court very properly refused to consider because, as was hereinbefore shown (See pages 28-33 hereof), the Court had no jurisdiction to consider them in connection with Petitioners' *second* appeal.

The validity of the counterclaim procedure is discussed in part E hereof, at page 43, and the Court is respectfully referred to such discussion.

As to the usury penalties allowed by the *National Banking Act*, Petitioners attempt to infer that both the trial court and the Florida District Court erred in their calculations as to the amount of interest actually paid. The fragmentary Record filed in this Court is sufficient to completely discredit Banks' assertions. It is apparent that the Chancellor adopted the figures presented by Banks' own audit. His Partial Final Decree so states, referring as it does to Plaintiffs' Exhibit 47 (A. 62). In his Partial Final Decree, the Chancellor found (PR. 1-16, A. 10):

"(a) Liability of Coral Gables First National Bank.	
(1) For double the interest collected prior to March 20, 1957, in the amount of $49,855.44, as per Schedule 1, Pentland, Purvis, Keller & Co. audit, Plaintiffs' Exhibit No. 47.	$ 99,710.88
(2) For double the interest collected subsequent to March 20, 1957, in the amount of $5,370.35, per note jackets covering the renewal contract note, Defendant's Exhibits I and J	10,740.70
	$110,451.58
Less amount credited to principal on renegotiation	35,584.06
Total due by Coral Gables First National Bank	$ 74,867.52"

Reference to the audit of Pentland, Purvis, Keller & Co., submitted by Banks as Pl. Ex. #47, will disclose that Banks' own auditor computed the total interest paid to be $49,855.44. At the bottom of Schedule 1 of said audit

(A. 62) the auditors state that the total interest was $49,855.44; that $35,584.06 was credited upon renegotiation; and that the net interest, after the credit of renegotiation was $14,271.38. These are exactly the figures used by the Chancellor. In accordance with the *Federal Statute, 12 U.S.C., § 86*, he doubled the total interest collected prior to March 20, 1957, of $49,855.44, making a total of $99,710.88; added $10,740.70, double the amount collected after March 20, 1957; and then subtracted the credit of $35,584.06 thus making a total penalty of $74,867.52. The Banks now try to mislead this Court as to the results found by their own auditor.

The Florida District Court by its 1960 Opinion (PR. 22-41, A. 16) completely sustained the aforegoing, but at the same time modified that portion of the Chancellor's decree which would have required the Coral Gables First National Bank to forfeit its unpaid principal balance. In so doing, the Florida District Court corrected any possible error of the Chancellor as to any Federal question. In this regard, it must be remembered that it is this same *1960 Florida District Court Opinion* which this Court refused to review when it denied Banks' prior Petition for Writ of Certiorari filed in this Court, and that it is the *1961 Florida District Court Order* with which the current Petition for Writ of Certiorari is concerned.

D. There Is No Federal Question As to the State Bank.

This Court will not review decisions of a State Court with respect to State Law where there is no contention that the State Law or the interpretation thereof are in any wise repugnant to any *Federal Statute* or the *Constitution of the United States*. There is no intimation, in the voluminous Petition for Writ of Certiorari, of any Federal question having been raised with respect to the State Bank.

Petitioners do not even contend that any Federal principle has been violated with reference to the State Bank. Accordingly, there is no reason for this Court to review as to the State Bank; indeed there is not even an alleged error, correctible by this Court, with reference to the State Bank. We most respectfully suggest that the Petition is an attempt on the part of the State Bank to hide behind its affiliate National Bank and, so hiding, to ride into this Court on the coat tails of a fictional error claimed by the National Bank. We suggest that this procedure serves to confirm the finding contained in the *1960 Florida District Court Opinion* (119 So.2d 741, at page 748):

> "A careful scrutiny of the proceedings that took place at the time of and subsequent to the making of the original loan indicates that by the device of participation, the *State Bank attempted to lend its funds through a chartered National Bank without subjecting itself to the loss of its principal in the event that the loan was found to be usurious* under § 687.07, Fla. Stat., F.S.A. The most that the State Bank could lose if this device was successful, using the National Bank as its conduit, would be double the interest actually received by the National Bank or a forfeiture of interest that was to accrue."

E. The Decision Below Is Correct.

That the *1960 Florida District Court Opinion* is correct is easily demonstrated by brief review of the actual points upon which the matter was decided.

1. The Usury Penalties Provided by the National Banking Act May Be Recovered Against a National Bank by Way of Counterclaim.

We have already indicated to the Court that Petitioners have not preserved the question of the propriety of the use of counterclaim procedures to recover the double interest usury penalties provided by the *National Banking Act.*

Nevertheless, in response to Petitioner's argument that the cases decided by this Court prohibit such recovery by way of counterclaim, we first of all admit that there are many cases so holding.

However, *all of such cases were decided without consideration of the adoption of the Federal Rules of Civil Procedure.* The only case that has been decided on this point with consideration of the adoption of the *Federal Rules of Civil Procedure* is the case of *John R. Alley & Co. v. Federal National Bank of Shawnee, supra,* in which the Circuit Court of Appeals decided that usury penalties could be and should be recovered by way of counterclaim.

That case is extensively discussed, beginning at Page 59 of this Brief in Opposition, and we respectfully refer to our quotations therefrom. It would be presumptuous for us to attempt to add to the concise and convincing argument advanced by the Circuit Court of Appeals. We believe it to be indisputable not only that the penalty can be recovered by way of counterclaim, but also that failure so to counterclaim, by the compulsory counterclaim provisions of the *Federal Rules*, and by similar provisions of the *Florida Rules of Civil Procedure*, would constitute a waiver of any right. *Rule 1.13 (1), Florida Rules of Civil Procedure.*

2. The Requirement, by the Lender, That the Borrower Maintain Substantial Cash Deposits under the Joint Control of the Lender, Makes the Loan Usurious If the Interest Actually Reserved, Charged, or Taken by the Lender Amounts to More Than Legal Interest on the Sum Actually Available for the Use of the Borrower.

There is no division of authority on this question; on the contrary, the Courts and the writers have been unanimous in holding such a transaction to be usurious. *Corpus*

Juris Secundum, Volume 91 Usury, page 616, § 35(d), states:

> "* * * where the lender charges legal interest on the full amount of the loan but requires a portion to remain in his possession as security, the transaction is usurious."

Likewise in, *American Jurisprudence, Volume 55, page 334,* § 15, we find:

> "If as a condition of making a loan the borrower is required to leave part of the money on deposit with the lender, the transaction is usurious if the interest paid for the loan amounts to more than legal interest on the sum actually available for the use of the borrower."

The leading case on this subject is that of *Planter's National Bank of Virginia* v. *Wysong & Miles Company, et. al., supra,* in which the jury found that there was an *oral agreement* between the plaintiff-bank and the defendant-borrower by which the defendant-borrower was to keep on deposit with the plaintiff-bank an amount equal to twenty (20%) percent of the loans made by the plaintiff-bank to the defendant-borrower. The Court said:

> "The usury is plain and palpable, and there can be no doubt of the intent, on the part of the bank, to violate the law against the payment of excessive interest, or usury * * * the usury is indisputable."

A similar case is that of *East River Bank* v. *Hoyt, supra,* in which it appeared that a bank discounted a note for $1,500.00 on condition that $500.00 of the amount should remain on deposit until the note came due, and required of the customer his check for that sum payable at the time the note fell due. Holding the transaction to be usurious because the bank insisted on the collateral account, the Court said:

"Assuming these facts to be true, it presents a case of bold, unmitigated violation of the statute, in its letter and spirit. If the statute prohibiting usury can be evaded by such a subterfuge as has been offered in this case, it has become a dead letter, and had better be repealed at once. *By such a contrivance, an individual or a bank, in the loan of one half their capital may draw interest upon the whole. The device in this case lacks even the merit of ordinary skill in its consummation; it is an act of cupidity and extortion, that is not provided with even the decencies of a cloak to cover its nudity.*"

An extensive search of the law has revealed no cases whatsoever in any way questioning the holding of the cited cases. That there have been only a few such cases indicates the wisdom of the Court's remarks in *East River Bank* v. *Hoyt*, *supra*.

The above case is directly in point. The evidence (See Statement of Facts) shows that Mr. Riley and the other officials of Banks provided for controlled Collateral Accounts #1 and #2 in order to use them as a part of Banks' contrivances for the purpose of exacting usury from Constructors. We believe that Petitioners in the case at bar, to paraphrase the highest Court of New York, used a "*device which lacked even the merit of ordinary skill in its consummation*" and perpetrated "*an act of cupidity and extortion*" against Constructors "*that is not provided with even the decencies of a cloak to cover its nudity.*"

Florida cases agree with this result. For instance, in *Mindlin* v. *Davis*, *supra*, which was an action by borrower for forfeiture of interest on an allegedly usurious note and mortgage, the lenders had retained part of loan to discharge borrower's prior mortgage held by third person, but instead of paying such mortgage immediately, lenders had paid only regular monthly payments in the name of borrowers. The Court held that the delay in paying the prior

mortgage constituted a delay in advancement of substantial portion of the loan, and constituted a violation of the usury statute. The Court said:

> "We must next decide whether appellants' method of discharging the Chase mortgage renders this transaction usurious. To decide that question we must consider the fact that the payment by appellants of the Chase mortgage on behalf of the borrowers, appellees, is in legal effect only a disbursal of the proceeds to the borrowers, but elected to be made directly by lenders to the mortgagee as a precaution to assure to the lenders the discharge of that mortgage constituting a lien prior to their own. *Thus a delay in making that payment amounts to a delay in the advancement of a substantial portion of the loan. Since time as well as amount of principal is a factor in the calculation of interest, it is evident that retention of a substantial portion of the loan without a corresponding abatement of interest on the amount retained has the effect of substantially increasing the per centum of interest on the actual amount advanced by the lenders and received by the borrowers; which is the significant amount contemplated by the statute.* It is undisputed in the evidence that the retention by the lenders of that portion of the principal earmarked for the Chase mortgage was by their original intention and design, that it continued for over *seven months*, and although gradually reduced by installments, would have continued throughout the term of the loan except for the compulsion of this litigation. *It is not difficult to appreciate the effect of such a scheme and to recognize it as a device or contrivance for the exaction of usurious interest condemned by the statute. The statute recognizes that usurers are necessarily driven to various schemes and devices to cover their evasions of the law, and the Courts have always been alert to recognize the substance of their transactions and to impose the prescribed penalties.* 55 Am. Jur., Usury, Sec. 14, page 332; Wicker v. Trust Co. of Florida, 109 Fla. 411, 147 So. 586; Beacham v. Carr, 122 Fla. 736, 166 So. 456; Grider v. Calfee 242 Ala. 50, 4 So.2d 474.

*"We hold, therefore, that the scheme resorted to in this case constitutes a violation of the usury statute * * *."*

Similar results were reached in *Crompton* v. *Smith*, *supra*, in *Purvis* v. *Frink*, *supra*, in *Wilson* v. *Conner*, *supra*, in *Carr* v. *Cole*, *supra*, and in *Chakford* v. *Sturm*, *supra*. Moreover, in *Crompton* v. *Smith*, *supra*, where it was alleged that the mortgage violated usury laws by exacting more than ten (10%) percent per annum of the actual principal sum received by the borrower, the Court said that *"actual principal sum received" (F.S. § 687.03)* means *the amount of money which the lender turned over to the borrower when the note was signed and the loan completed*. Accordingly, where a discount, interest taken in advance, or withholding of proceeds, are concerned in the transaction, it is the amount received by the borrower, and not the face of the note, which must be used in computing the effective rate of interest.

We respectfully contend that the substantial withholding by Banks, in Collateral Accounts Nos. 1 and 2, both of which required the signature of George Riley, Vice-President of The Coral Gables First National Bank, brings the case at bar positively within the rules stated in the foregoing cases; and that the Chancellor was absolutely right in his decree so holding.

3. The Loan of $442,400.00 (Pl. Ex. #6, A. 54-61) Was Usurious in Its Inception, in That the Terms and Conditions Thereof Required the Borrower to Maintain Such Substantial Cash Deposits with the Lenders That the Interest Actually Reserved, Charged or Taken by the Lenders Was in Excess of Twenty-Five (25%) Percent of the Sums Actually Available for the Use of the Borrower.

Assuming, for the purpose of argument *only*, that we accept the construction of the transaction most favorable

to Banks, it is apparent that Banks contend that they had the *right* to receive and hold as collateral security all payments coming from the West Palm Beach Contract. By the terms of Sewer Contracts 7 and 9 (Pl. Ex. 29, pages C-1, C-2) *they were to be completed within 240 calendar days from August 29, 1956;* progress payments were to be made monthly; and final payment was to be made within a short time after completion. Banks claim that the right to hold these payments inures to them as assignees of the contract proceeds; accordingly, they are charged with knowledge of the contract provisions, and cannot deny that they were fully aware of the completion date of 240 days from August 29, 1956. Inasmuch as the loan was negotiated on November 14, 1956, about 77 days after the signing of the contracts, it is clear that Banks contemplated collecting from City and retaining in Collateral Account #2, within 163 days (240 minus 77) thereafter, and certainly within six (6) months thereafter, the total proceeds of said jobs, in the amount of $600,362.00. This, of course, would be more than sufficient to completely pay the loan and the usurious interest at maturity.

In other words, it is the contention of Banks that after about six (6) months they were to be entitled to hold, in a controlled collateral account requiring the signature of an officer of The Coral Gables First National Bank, funds at least equal to the principal amount then remaining unpaid on the note, plus interest which would accrue up until the maturity date of the note *some eighteen months later;* and that the borrower, Constructors, was to be *required* to maintain the controlled Collateral Account during this period, and, *although deprived of the use of the funds, to pay interest thereon.*

Moreover, out of the total original proceeds of the loan, the sum of $135,597.62 was originally held in a similar

controlled account, entitled "Collateral Account No. 1" *and was paid out only as payments were deposited in controlled Collateral Account No. 2.* By these contrivances the borrower, Constructors, was required at all times to maintain substantial balances in accounts called collateral accounts. These accounts required the signature of Mr. Riley, Vice President of The Coral Gables First National Bank, on any and all withdrawals therefrom (Pl. Ex. 27).

The total interest reserved by the face of the note, added to the $44,140.00 retained by Banks, amounted to a total of $85,029.92 actually reserved, charged, or taken by Banks (Tr. 775, Vol. VIII, R. 1430, A. 39, Pl. Ex. 47, Schedule #2), all of which Banks intended to collect notwithstanding that within six (6) months they would have collected, and deposited in Collateral Account No. 2, funds in excess of the principal amount then remaining unpaid on the note, plus interest which would accrue up until the maturity date, *some eighteen (18) months later.* It is clear, from the authorities heretofore cited, that Banks are not entitled to collect interest on the funds *required to be deposited* in the controlled "Collateral Accounts". Accordingly, the interest of $85,029.92 amounts to approximately forty-two and sixty-six one-hundredths (42.66%) percent per annum on the $398,160.00 claimed to have been disbursed by Banks, and to approximately thirty-eight and forty one-hundredths (38.40%) percent per annun on the $442,400.00 face amount of the note. These computations were testified to by Esten A. Ulmer, Certified Public Accountant, at Tr. 764 (Vol. VIII, R. 1419, A. 47-51) and were substantially verified by Mr. Clayton L. Bullock, Certified Public Accountant, a witness for Banks, at Tr. 587, 588, and 589 (Vol. VII, R. 1239, 1340 and 1241, A. 39-46). The Court will note that portions o the testimony of these accountants have been reproduced in our Appendix.

It is most respectfully contended that to allow suc a subterfuge to avoid the usury laws would be to effectively destroy them, since a bank, or other lending institution or individual, by merely requiring cash to be deposited with them as collateral for their loan, could easily double, triple, quadruple, or otherwise multiply their effective rate of interest to whatever extent they desired; and that accordingly, the Chancellor and the Florida District Court were correct when they ruled that the loan of $442,400.00 was usurious in its inception.

4. The Note of $442,400.00 Was Void In Its Inception.

Under the laws of the State of Florid the note of $442,400.00 was absolutely void, because it was criminally usurious. The statutory background and the Opinions so holding are fully discussed at Page 70 of this Brief in Opposition.

F. There Is No Conflict of Decisions.

Petitioners, apparentl grasping in an attempt to create a Federal constitutional issue and intimating that the Florida Court applied to them a construction of the *Florida Usury Statutes* completely different from that applied to other lenders, complain to this Court at page 50 of their Petition, that:

> "We have heretofore pointed out that under the Florida decisions of *Shorr* v. *Skaate*, Florida Supreme Court decision, 90 So.2d 604, *Clark* v. *Grey*, 132 So. 832 and *Carter* v. *Leon Loan & Finance Company*, 146 So. 664, the new contract under the Florida law was free of usury, if there had been any usury in the first place."

We have been unable to find any previous mention of these cases in the Petition. However, Petitioners appar-

ently contend that these cases require the holding that the Loan Repayment Agreement of March 20, 1957 (Pl. Ex. 8), amounts to an abandonment of the original usurious contract and has the effect of purging admitted usury. Not so. The cases of *Clark* v. *Grey, supra*, and *Carter* v. *Leon Loan & Finance Company, supra*, are plain authority for the position of respondents, that *where a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter renewal or substituted contract.* They have been so interpreted in *Wenck* v. *Insurance Agents Finance Corporation, supra*, as follows:

> "* * * This position is not compatible with the holding that where a usurious contract is renewed by the giving of a renewal or substituted contract, the usury follows into and becomes a part of the latter contract. Clark v. Grey, 101 Fla. 1058, 132 So. 832; Carter v. Leon Loan & Finance Co., 108 Fla. 567, 146 So. 664; 55 Am. Jur., Usury, §96."

The case at bar is governed by the same rules. The "Renewal Contract Note" (Pl. Ex. 9) and the "Loan Repayment Agreement" (Pl. Ex. 8) were executed under duress and are clearly infected with the same usury as affected the original $442,400.00 loan. These findings of fact were made not only by the Trial Court, but also by the Florida District Court.

Shorr v. *Skafte*, (S. Ct., Fla., 1956) 90 So.2d 604, does not in any way admit the interpretation placed upon it by Petitioners. Rather, it requires a holding that there was no purging of interest. The lender had charged forty (40%) percent interest, by withholding $1,000.00 from a $6,000.00 six month loan; and, when the defense of usury was interposed by the borrower, the lender attempted to avoid the consequences of his act by pleading ignorance of

the usury laws. The special master and the Chancellor found for the lender. The Florida Supreme Court reversed and held for the borrower, saying:

> "'We reiterate what was said in Carter v. Leon Loan & Finance Co., 108 Fla. 567, 146 So. 664: 'It has been repeatedly held that the usurious character of a contract must be determined as of the date of its inception, and, if usurious at that time, no subsequent transaction will purge it. *When such contracts are renewed by a new or substituted contract, usury follows, and becomes a part of the latter contract, making it vulnerable to the defense of* usury in like manner as the original contract.' * * *"

The very pleadings of Banks affirmatively allege that their action is based upon the original note of $442,400.00 and that the Renewal Contract Note was merely an extension thereof. The District Court of Appeal of Florida, Third District, was eminently correct when it said (Opinion pages 10 and 11, A. 25):

> "The Banks' secondary argument that a new contract was entered into that purged the old of its usurious odor is *not borne out by the record, including their own pleadings.* The Banks, in their complaint seeking foreclosure of the mortgage in question, affirmatively alleged that 'on March 20, 1957, there was due and unpaid on said note of $442,400 (Pl. Ex. 3) the principal sum of $218,275.27 as evidenced by a *renewal contract note* of that date in the sum of $218,275.27. * * * Plaintiffs would show unto the Court that *said renewal note* of $218,275.27 *was simply a renewal and extension of the note of November 14, 1956,* in the sum of $442,400 * * *.' [Emphasis supplied] The general rule followed in this state is that the usurious character of a contract must be determined as of the date of its inception, and if usurious at that time, no subsequent transactions will purge it. When such contracts are *renewed* by a *new* or *substituted contract, usury follows* and 'e-

comes a part of the latter contract, making it vulnerable to the defense of usury in like manner as the original contract."

It is apparent that there was no abandonment of the original contract; and that the conflicts alleged by the Banks do not exist. The Petition for Certiorari as to this point, should surely be denied.

G. There Is No Important Question of Federal Law.

Petitioner-Banks wax eloquent in their attempts to gain admittance to this Court by implying important questions of Federal Law and complaining, at Page 31 of their Petition, that the 1960 *Florida District Court Opinion* (which is not the Opinion their Petition for Writ of Certiorari seeks to have reviewed)

> "* * * flaunts the Federal Statute, flaunts the long series of opinions by this Court, and if allowed to stand, would create a precedent that would be disastrous to National Banking interests throughout the United States, and particularly in the State of Florida."

Similarly, Petitioners insist that, if the decision below is allowed to stand (Petition, Pages 52 and 53):

> "The entire National Bank system in the State of Florida would be wrecked, and the control by Congress of a National Bank under its protective statutes would be flaunted, ignored and reduced to absurdity."

Apparently Petitioners would have the Court believe that their actions were a normal, everyday occurrence; but certainly the exacting of criminal usury is not a normal and customary business practice. This is the same sort of transparent argument as that of the Alabama Banker's Association as *amicus curiae* in *Daniel* v. *First National Bank of Birmingham, supra.* The Court said:

"The amicus curaie, Alabama Banker's Association, rather plaintively inquires:

'If the Court should be willing to do no more than to indicate how the function of discounting paper can escape the hazard of factual uncertainty and highly technical minutiae to escape attack, it would be of great service and might indeed tend to avoid a panic retrenchment in installment paper discounting.'

"It seems to us that a Bank not itself guilty of charging or of knowingly collecting usurious interest or discount would not have violated the statute (12 U.S.C.A., §86, supra, footnote 1 to the original opinion). Except as changed by that statute, the Bank's position as a holder in due course, vel non, would be determined upon the principles of the negotiable instruments law, the same as any other financial institution.

"The appellee Bank admits that it charged usurious discounts contrary to the federal statute. See 12 U.S.C.A., §85 (footnote 1 to original opinion); Gloversville National Bank v. Johnson, 14 Otto 271, 104 U.S. 271, 26 L. Ed. 742. It insists, however, that it was pursuing a usual and customary business practice. *Whether so or not, it is a practice which it must concede that a National Bank can safely engage in only so long as it can rely on its assignor not to sue under the federal statute.* Probably such reliance is justified if its assignor has passed on the usurious interest rate to the purchaser of the vehicle. No doubt the Bank views its legal status from a position different from that of this Court. *It seems to us that in reality what the Bank is asking this Court to hold is that probably the most numerous class of persons in need of protection from the state and national laws against usury are removed from that protection by the simple expedient of using the term 'time price' as a cloak to conceal usury.* That, we of course will not do. The petition for rehearing is

"Denied."

If, as Petitioners apparently contend in this case, it is the usual practice for Banks in this area to unauthorizedly sell their borrower's collateral when the debts are not in default and hold the proceeds in cash, meanwhile continuing to collect interest on the full amount of the loan, we most respectfully suggest that the foregoing decision of the United States Court of Appeals for this very circuit, interpreting the same federal statute before this Court in this case, and applying it to a national bank such as the National Bank in this case, will be extremely persuasive. Paraphrasing the aforegoing opinion, if Banks were engaging in a usual and customary business practice; it was a practice which they could safely engage in only so long as their borrower did not elect to sue Banks under the usury statutes.

The exacting of criminal usury by Banks is against the laws of Florida, and the United States, against business ethics, and contrary to public policy. Their insipient argument that it was "a usual and customary business practice" is but the sputtering of a knave seeking to hide himself in the sunlight of righteousness. The Florida District Court very properly said (1960 Opinion, A. 24-A. 25) that these arguments are without substance.

Petitioners contend that the loan was within the purview of *Federal Banking Statutes* and the rulings of the *Comptroller of Currency*, citing a portion of *Comptroller's Opinion No. 9530* (Petition, page 54) (A. 70). However, Petitioners fail to complete the quotation, and by so failing, completely change the meaning of the quoted material. We supply the omission:

> "R.S. 5197 (12 U.S.C. 84) limits the interest charges of national banks to the rate 'allowed by the laws of the State * * * where the bank is located * * * except that where by the laws of any State a different rate is limited for banks organized under State laws,' na-

tional banks located in that State may also charge such higher rate.

"The courts have held that *if a borrower is required to leave part of the proceeds of a loan on deposit with the lender, the transaction is usurious if the interest paid amounts to more than the legal interest on the sum actually available* for use by the borrower."

With the omission supplied, the alleged important question of Federal law evaporates. Only $262,562.38 was actually available for the use of the borrower; under the rulings of the Comptroller, interest must be computed on this amount and this is exactly what was done by the Chancellor and affirmed by the Florida District Court. Parenthetically, we regretfully suggest that the failure to quote the full text of the opinion cannot be interpreted as other than purposeful, inasmuch as it was heretofore omitted from the brief of Petitioner-Banks filed in the Supreme Court of the State of Florida, as well as from the first Petition for Writ of Certiorari filed by Petitioners before this Court, and we noted their omissions in our Responsive Brief filed in the Supreme Court of the State of Florida, as well as in our first Brief in Opposition filed in this Court in connection with Case No. 559 of the October Term, 1960.

XI

RESPONSE TO PETITIONERS' ARGUMENT

A. The State Court Did Not Violate the Specific Provisions of 12 U.S.C., §86.

The essence of Petitioners' complex Argument Point 1 and of their "Reasons for Granting the Writ" is that the *1960 Florida District Court Opinion* violated *12 U.S.C.*,

§86, and is in conflict with *McCollum* v. *Hamilton National Bank of Chattanooga*, 58 S. Ct. 568, 303 U.S. 245, 82 L. Ed. 819. We remind the Court that the *1960 Florida District Court Opinion* is not the order which the Petition for Writ of Certirorari seeks to have reviewed. On the contrary, the *1960 Florida District Court Opinion* is the Opinion which this Court has already refused to review by its Order dated February 20, 1961 (365 U.S. 811, 81 S. Ct. 690, 5 L. Ed. 2d 691). The order here sought to be reviewed is the *1961 Florida District Court Order* quashing Petitioners' (Appellants there) appeal; and we reiterate that the only matter which the Florida District Court could decide, at that juncture, was whether or not the Chancellor's Order of April 14, 1961 (PR. 176), complied with the prior *1960 Florida District Court Opinion*.

The entire argument urged by Petitioners in support of their Point 1 is directed to the *1960 Florida District Court Opinion*, and, therefore, we feel that is not properly included in the Petition. Nevertheless, we propose to show to this Court that said *1960 Florida District Court Opinion did not violate 12 U.S.C., §86.*

The essence of Petitioners' argument is that counterclaim procedures may not be used to recover the double interest usury penalties provided by *12 U.S.C., §86.* Petitioners have not shown how this question has been preserved; and, in fact, we believe that they did not preserve it. It was argued in the Trial Court; but Petitioners did not urge error in this regard during their first appeal to the Florida District Court. The question was raised for the first time in appellate proceedings by their second appeal to the Florida District Court, which appeal was quashed. Nevertheless, in response to Petitioners' argument that the cases decided by this Court prohibit such recovery by way of counterclaim, we first of all admit that *McCollum* v. *Hamilton National Bank*, *supra*, and many other cases, do so hold.

However, *all of such cases were decided without consideration of the adoption, effective September 6, 1938, of the Federal Rules of Civil Procedure.* The only case that has been decided on this point with consideration of the adoption of the *Federal Rules of Civil Procedure* is the case of *John R. Alley & Co. v. Federal National Bank of Shawnee, supra,* in which the Circuit Court of Appeals decided that usury penalties could be and should be recovered by way of counterclaim.

In that case, the Federal National Bank alleged that John R. Alley & Company, a contractor, was indebted to it for the balance due on certain notes. The contractor counterclaimed, charging the bank with usury and praying forfeiture of twice the amount of usurious interest charged. The bank moved to dismiss the counterclaim on the ground that such claim must be the subject of a separate action or an original proceeding, and the lower Court granted the motion and dismissed the counterclaim. The Circuit Court of Appeals reversed, holding in part as follows:

> "* * * The spirit of the new rules is to have a speedy adjudication of all controversies between the parties in a single action and without a multiplicity of suits. *The counterclaim arose out of the transaction and is maintainable in this action,* unless prohibited by some rule of law.
>
> "The Congressional authority given the Supreme Court to adopt rules was limited to matters of procedure in the Federal District Court. It was expressly provided that substantive rights should neither be abridged, enlarged nor modified. They were left untouched by the rules. 48 Stat. 1064, 28 U.S.C.A., Sec. 723b. * * *
>
> "It is necessary to distinguish between a substantive right and the vehicle or medium through which it is enforced. The substantive right created by the statute is the right to recover twice the amount of

usury as a penalty. This right could in no wise be affected by the new rules. The method or procedure provided in the statute for the enforcement of the right was an independent action in the nature of an action of debt, and under the decisions it was held that this right could not be asserted in the form of a counterclaim in a pending action. *But the new rules provide for the settlement of all controversies arising between parties in a single action. They specifically provide for compulsory counterclaims arising out of a 'transaction' or 'occurrence'. The right to the penalty admittedly arose out of the transaction which the bank seeks to enforce and is therefore maintainable as such under the new rules.*

"If there is a conflict between the procedure provided for in the statute for the enforcement of the right created thereby and that provided for in the New Rules of Civil Procedure, *the former must yield to the latter*, because the Congressional authority under which the new rules were adopted expressly provides that after they become effective any laws in conflict therewith are of no further force or effect. *The new rules have the force and effect of statutes.* Sibbach v. Wilson & Co., 312 U.S. 1, 61 S. Ct. 422, 427, 85 L. Ed. 479.

"As was said in the last cited case: '* * * the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth.' We see no reason why the new rules should not apply to the remedy to be employed in asserting the substantive right to recover the penalty provided by law in the case of usury."

It would be presumptuous for us to attempt to add to the concise and convincing argument advanced by the Circuit Court of Appeals. We believe it to be indisputable not only that the penalty can be recovered by way of coun-

terclaim, but also that failure so to counterclaim, by the compulsory counterclaim provisions of the *Federal Rules*, and by similar provisions of the *Florida Rules of Civil Procedure;* would constitute a waiver of any right. *Rule 1.13 (1), Florida Rules of Civil Procedure.*

Also in connection with their Argument Point 1, Banks argue with the interpretation, by the Courts of Florida, of the Florida Usury Statutes, telling this Court that the *1960 Florida District Court Opinion* (which is not the Opinion which the Petition for Writ of Certiorari seeks to have reviewed), contains computations which "are utterly confused and provide for at least three times the amount of interest that could be charged under any concept of the Florida law". (Petition, page 37).

We need not remind this Court that it is not charged with the responsibility of correcting errors of a State Court on matters of State law involving a State Bank—if, indeed, there were such errors, and we have heretofore shown that there were not. It must be remembered that the *1960 Florida District Court Opinion* assessed against the State Bank the forfeiture of principal penalty provided by *Florida Statute, § 687.07.* No penalty under Florida law was assessed against National Bank; rather, the Court reserved to National Bank its proportionate share of the remaining unpaid principal, and assessed against National Bank the usury penalty provided by *12 U.S.C., § 86,* namely, forfeiture of twice the interest actually collected by National Bank. The Chancellor made findings of fact as to the amount of interest actually collected by National Bank from Constructors, and by doubling this amount, pursuant to *12 U.S.C., § 86,* the Chancellor determined the penalty to be imposed under the *National Banking Act* against National Bank. This penalty was affirmed by the

1960 Florida District Court Opinion. Surely there was no error.

B. The Florida District Court Has Not So Construed 12 U.S.C., Sections 85, 86, in Such a Way As to Make It Void and Inoperative for All Practical Purposes.

The argument contained under Argument Point 2 in Banks' Petition for Writ of Certiorari, beginning at Page 40 thereof, is completely directed to the *1960 Florida District Court Opinion*, which Opinion this Court has already refused to review when it denied Banks' Petition for Writ of Certiorari in Case No. 559 of the October Term, 1960 (365 U.S. 811, 81 S. Ct. 690, 5 L. Ed. 2d 691). As we have already pointed out, the Florida District Court could not again review this matter in connection with its 1961 Order quashing Petitioners' appeal, because the only matter with which it could possibly be then concerned was whether or not the Order and Judgment on Mandate of the Chancellor of April 14, 1961 (PR. 176-181) complied with the *1960 Florida District Court Opinion.*

But the *1960 Florida District Court Opinion* (which is not the opinion to which the Petition for Writ of Certiorari is directed) does not so interpret *12 U.S.C.A., §§ 85, 86,* as to make them void and inoperative. It specifically applies these Statutes to the findings of fact of the Chancellor, which findings of fact the *1960 Florida District Court Opinion* also affirms. *12 U.S.C., §§ 85, 86,* were specifically applied in exactly the fashion that this Court has always directed that they be applied; and National Bank, pursuant thereto, was penalized in an amount equal to twice the interest which it had collected from Constructors. Certainly this does not constitute making *12 U.S.C., Sections 85 and 86,* void and inoperative.

Under Argument Point 2 Banks say that the State Court:

> "* * * decreed that the National Bank would forfeit or lose all of its principal claim, balance due of $151,802.46, with the exception of 7% thereof, or an additional collateral penalty of approximately $140,000." Petition, page 42.

This is not the case and the State Court did not so hold. The State Court did hold that the Pan American Bank of Miami, a State bank, in a pre-arranged attempt to circumvent the principal forfeiture provisions of *Florida Statute, Section 687.07*, made a loan through its affiliate, The Coral Gables First National Bank; and that The Coral Gables First National Bank actually loaned only approximately 7% of the original principal advanced. The Chancellor, feeling that the *Federal Statutes* would not protect the National Bank, forfeited even the National Bank's 7% of the unpaid principal balance; but the *1960 Florida District Court Opinion* (which is not the Opinion to which the Petition for Writ of Certiorari is addressed) modified the Chancellor's Partial Final Decree and refused to allow forfeiture of such portion of the unpaid principal, approximately 7%, as had actually been loaned by the National Bank. The *1960 Opinion* stated (PR. 22-41, A. 27, 119 So.2d 741, at Pages 747 and 748):

> "Another question raised collateral to the Banks' argument that penalties were unlawfully and illegally assessed against the National bank, is that portion of the decree which voided the right of both Banks to collect the balance of $151,802.46, plus interest, the sum allegedly remaining due and unpaid on the renegotiated loan of March 20, 1957. This latter contention of the Banks is bottomed upon the factual premise that the State bank had a participation of only 10% in the renegotiated loan, with the balance of the loan, al-

legedly represented by the funds of the National bank. This contention has partial merit, that is to say, that the Federal Act applicable to National banks as well as the decisions construing the same have almost unanimously concluded that only those penalties provided by the Federal Act could be invoked against a National bank. However, the record in this case discloses, and the chancellor found, that the loan was usurious in its inception, i. e., November 14, 1956. We have concurred in this conclusion; consequently, it is necessary to analyze the status of the participation of the respective banks at the time that the loan was found to be usurious. On November 14, 1956, or shortly thereafter, the National bank participated to the State bank $243,320 of the original loan. However, since the record clearly demonstrates, and the chancellor found, that the borrower received at most approximately $263,000 from the loan of $442,400, it would follow that the State bank's participation in the funds actually made available to the borrower was in excess of 92% of the amounts loaned. Likewise, it follows that the National bank would have furnished slightly in excess of 7% of the original monies loaned. *A careful scrutiny of the proceedings that took place at the time of and subsequent to the making of the original loan indicates that by the device of participation, the State bank attempted to lend its funds through a chartered National bank without subjecting itself to the loss of its principal in the event that the loan was found to be usurious under § 687.07, Fla. Stat., F.S.A. The most that the State Bank could lose if this device was unsuccessful, using the National bank as its conduit, would be double the interest actually received by the National bank or a forfeiture of interest that was to accrue.* In the final analysis, we conclude that the chancellor was correct in forfeiting interest due and unpaid as it applied to both the State and National banks, but that he was in error when he decreed a forfeiture of the entire amount of principal. Such portion of the remaining unpaid principal on the original loan, here-

inabove noted to be approximately 7%, as had not been participated by the National bank to the State bank should have been reserved by the chancellor's decree to the National bank rather than forfeited. In forfeiting that portion of the unpaid balance of the principal belonging to the National bank, the chancellor's decree conflicts with the decisions of the Federal courts as well as those of many state courts of last resort, which hold that only the penalties prescribed by the Federal Act can be invoked against a national bank, namely an affirmative forfeiture of double the amount of interest actually paid or a cancellation or forfeiture of interest that is to accrue and is unpaid."

The actual holding of the *1960 Florida District Court Opinion* thus reserved to National Bank its share of the unpaid principal of the loans.

C. The State Court Did Not Impose Penalties Against the National Bank in Excess of the Total Amount of Principal Involved in the Transaction.

Petitioners' Argument Point 3 makes assumptions which are completely incorrect. The point is stated in a question, each clause of which is in error. In order to demonstrate these errors, it is necessary to analyze each clause of the question as stated by Petitioners.

The first clause of the question reads as follows (Petition, Page 44):

> "Where the Federal Statute Covering Allowable Usury Penalties Against a National Bank Under the Provisions of U.S.C.A., Title 12, Paragraph 86, is Restricted to a Defense in an Action to Enforce the Debt, to a Forfeiture of the Interest Unpaid but Contracted for, Without Any Invasion of the Principal Amount Due, * * *."

The aforegoing portion of the question posed by Petitioners as their Argument Point 3 is incorrect. It assumes that *12 U.S.C., § 86*, in an action brought by the usurious lender to enforce a usurious debt, restricts the penalty to a forfeiture of interest not already paid. We have heretofore shown, by reference to the case of *John R. Alley & Co. v. Federal National Bank of Shawnee, supra* (see Page 59 of this Brief), that the borrower may counterclaim for recovery of twice the interest paid; in fact, that if the borrower fails so to counterclaim, he would waive the double interest penalty provided by *12 U.S.C., § 86*, under both Federal and State compulsory counterclaim rules.

The second portion of the question posed by Petitioners as their Argument Point 3 is as follows (Petition, Page 44):

> "* * * Or Where in the Event Any Usurious Interest is Actually Paid, to a Separate Suit by the One Making the Payment for Double the Amount of the Interest Actually Paid, * * *."

This portion of Petitioners' question also assumes that the counterclaim procedure is invalid. Petitioners' assumption is shown to be incorrect by our prior discussion of *John R. Alley & Co.* v. *Federal National Bank of Shawnee, supra.*

The last portion of the question posed by Petitioners as their Argument Point 3 is as follows (Petition, Page 44):

> "* * * May a State Court upon Alleged Equitable Grounds by Way of Penal or Compensatory Damages, Impose Collateral Damages and Penalties Against a National Bank in Excess of the Total Amount of the Principal Involved in the Transaction?"

This portion of the question assumes that the *1961 Florida District Court Order*, which the Petition for Writ

of Certiorari seeks to have this Court review, imposes penalties in excess of the total of the principal involved in the transaction. The simple answer, of course, is that said Order does not award any damages, but only quashes Petitioners' second appeal to the Florida District Court. However, it is obvious from the entire Petition that Petitioners seek, through the guise of asking this Court to review the *1961 Florida District Court Order* quashing their appeal, to actually have this Court review the *1960 Florida District Court Opinion*. We must, therefore, determine whether, by that *1960 Opinion*, the Florida District Court allowed the imposition of penalties against the *National Bank* in excess of the total amount of the principal involved in the transaction.

Reference to the *1960 Florida District Court Opinion* (PR. 22, A. 16) will show that the note determined to have been usurious was in the original principal sum of $442,400.00, upon which Banks alleged the sum of $151,802.46 to be due at the time of filing of their Complaint; and that Banks in the same action sought also to recover upon two other notes, upon one of which they claimed the remaining principal sum of $13,888.95, and upon the other the principal sum of $92,690.85. Thus, the principal involved in the usurious loan transaction was $442,400.00, and the principal amount remaining due at the time Banks filed their complaint was the sum of $13,888.95, $92,690.85, and $151,802.46, or a total sum of $258,382.26. Now was the penalty awarded against the National Bank in excess of either of these amounts? Obviously, it was not. The penalty was $74,867.52, twice the interest collected by The Coral Gables First National Bank from Constructors of Florida, Inc., on account of the usurious $442,400.00 loan.

Thus, every premise in the question posed by Petitioners as their Argument Point 3 is without foundation

and has no basis in fact. Whether the answer to the so called Argument Point 3 be affirmative or negative is of no matter in this proceeding.

In the argument allegedly supporting their Point 3, Petitioners concern themselves with facts completely outside the Record before this Court. Petitioners have not seen fit to comply with this Court's rules requiring them to supply a complete transcript of the proceedings in the Courts below, as we have hereinbefore noted in connection with our Statement of Facts (Page 14 of this Brief in Opposition). The facts interspersed in connection with their Argument Point 3 are not in accord with the Record, or with the Partial Final Decree of the Chancellor, or with the *1960 Florida District Court Opinion.* Petitioners would have this Court believe that the Florida District Court ignored some $135,597.62 and forfeited this amount (Petition, Page 49); that if the Florida Court had given consideration to this sum of $135,597.62, there would have been no usury in the first place (Petition, Page 50).

The truth is that this sum of $135,597.62 was given due consideration by both the Chancellor and the Florida District Court. Reference to the Opinion of the Chancellor and to the *1960 Florida District Court Opinion* will disclose that the amount of $135,597.62 was the amount held by National Bank in Collateral Account #1. This amount was disbursed to Constructors of Florida, Inc.

> "* * * over a period of time from November 23, 1956, through January 7, 1957 * * *." (*1960 Florida District Court Opinion*, A. 16, 119 So.2d at Page 744).

At the same time, however, National Bank required the establishment of Collateral Account #2, concerning which the Florida District Court in its *1960 Opinion* (PR. 22, A. 16, 119 So.2d 741, at Page 744) said:

"The National Bank established a second account known as Collateral Account #2, in which it deposited the proceeds of payments received by it from City under the assignment of payments given by Constructors to the bank to secure the payment of the November 14, 1956, loan. The following amounts were received by the bank from City and deposited in Collateral Account #2:

November 29, 1956	$36,488.11
December 24, 1956	$42,750.32
January 24, 1957	53,247.39
February 26, 1957	24,168.04
March 1, 1957	37,502.25

"making a total of $194,156.11. * * *."

Similar holdings are found in the Chancellor's Partial Final Decree of June 26, 1958 (PR. 1-16, A. 1-15). The paying out of the $135,597.62 from Collateral Account #1 did not actually amount to a disbursement to Constructors because Banks received and withheld in Collateral Account #2 more than they paid out of Collateral Account #1. The Chancellor so found (Partial Final Decree, PR. 1-16, A. 5):

"* * * the entire amount originally withheld in Collateral Account No. 1 was paid over to Constructors of Florida, Inc., by January 7, 1957. During the time of these advances from Collateral Account No. 1, the Banks had received and deposited in Collateral Account No. 2, the sum of $122,749.34, and by the end of February, 1957, a net balance of $179,540.67; the Banks receiving in Collateral Account No. 2 more money than disbursed from Collateral Account No. 1. * * * *."

The case before the Chancellor was entirely governed by the proposition discussed at Page 44 of this Brief

in Opposition, namely; the requirement by the lender, that the borrower maintain substantial cash deposits under the joint control of the lender, makes the loan usurious if the interest actually reserved, charged, or taken by the lender amounts to more than legal interest on the sum actually available for the use of the borrower. The $135,597.62 cannot be considered as disbursed, because more than that amount was simultaneously received by Banks and withheld from Constructors in Collateral Account No. 2.

D. The State Court Was Correct in Holding the Agreement of March 20, 1957, to Be Void and Without Consideration.

By their Argument Point 4, Petitioners apparently contend that the Chancellor voided the Loan Repayment Agreement of March 20, 1957, because of the Unclean Hands Doctrine and that, in so doing, the State Court was in error. Petitioners boldly state (Petition, Page 53) that there are no authorities in the State of Florida supporting the action of the State Court.

Nothing could be further from the truth.

In the first place, the Chancellor did not void the Agreement of March 20, 1957, by application of the Unclean Hands Doctrine; rather, he held the Agreement, as well as the so-called Renewal Contract Note and the Usury Release, void because of the usury and duress involved in the original document. He said:

> "These documents were executed under compulsion and force of the precarious financial circumstances then existing due to the wrongful manner in which the loan accounts had been handled by the Plaintiff-Banks, are void and without consideration." (PR. 1, A, 8).

In the second place, there is abundant authority in the State of Florida for holding Banks' criminally usurious transaction and all documents related thereto to *be completely void.* The Usury Statutes of the State of Florida now found at *Chapter 687 of Florida Statutes,* have been in effect virtually unchanged since 1909, and the Courts of this state have long and continuously recognized that the Statutes distinguish between "CIVIL USURY" and "CRIMINAL USURY". See *Robbins* v. *Blanc*, 105 Fla. 625, 142 So. 223, at page 225; and *Ayras* v. *Green*, (S. Ct. Fla., 1952) 57 So.2d 30, at page 32.

"Civil Usury" is that usury defined by *F.S. 687.04*, as follows:

> "PENALTY FOR USURY; NOT TO APPLY TO TRANSFEREE OF NEGOTIABLE PAPER UNLESS USURY APPEARS ON FACE.—Any person, or any agent, officer or other representative of any person, willfully violating the provisions of §687.03 *shall forfeit the entire interest so charged, or contracted to be charged or reserved,* and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at law or in equity; and when said usurious interest is taken or reserved, or has been paid, then and in that event the person, who has taken or reserved; or has been paid, either directly or indirectly, such usurious interest, *shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of interest so reserved, taken or exacted;* provided, however, that *this shall not apply to a bona fide endorsee or transferee of negotiable paper* purchased before maturity, unless the usurious character should appear upon its face, or that the said endorsee or transferee shall have had actual notice of the same before the purchase of such paper, but in such event double the amount of such usurious interest may be recovered after payment, by action against the party originally exacting the same, in

any court of competent jurisdiction in this state, together with an attorney's fee, as provided in §687.06."

while "Criminal Usury" is that usury defined by *F.S. 687.07*, as follows:

"FORFEITURE AND PENALTY IN CASE OF EXCESSIVE INTEREST OR CHARGES.—Any *person, or the agent, officer or other representative of any person*, lending money in this state who shall willfully and knowingly *charge or accept* any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the *principal sum loaned*, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees or otherwise, or for forbearing to enforce the collection of such moneys or otherwise, *shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, and on conviction, be fined not more than one hundred dollars, or be imprisoned in the county jail not more than ninety days.*"

In analyzing these respective statutes, certain definite differences are immediately apparent. *F.S. 687.04*, applicable to "civil usury" provides lesser penalties, provides for no criminal penalties, and specifically provides that the defense of "civil" usury, as in the section set forth, shall not apply to a *bona fide* endorsee or transferee of negotiable paper, purchased before maturity, without knowledge of the infirmity.

F.S. 687.07, on the other hand, specifically provides for criminal penalties, and contains no provisions whatsoever for the protection of *bona fide* transferees or endorsees of negotiable paper. It is elementary statutory interpretation.

that the legislature, by omitting such protection with reference to criminally usurious instruments after providing for such protection as to civilly usurious instruments in a prior section of the same chapter, affirmatively intended that there be no such protection. In other words, even an absolutely innocent holder in due course of a negotiable instrument infected with criminal usury would be unable to enforce the note as to its maker.

Such distinctions between civil usury and criminal usury can be interpreted only as evidencing the intent of the legislature that *those instruments infected with criminal usury should be wholly void and unenforceable.* The Supreme Court of the State of Florida has squarely and unequivocably so held in every case in which it has been called upon to decide the issue.

In *Richter Jewelry Co., Inc.*, v. *Schweinert*, 125 Fla. 199, 169 So. 750, on re-hearing on July 24, 1936, at page 758, the Supreme Court of Florida concisely and succinctly stated:

> "If, as our statute provides, where more than 25 percent per annum is exacted, the entire sum of both principal and interest is forfeited, no element of validity remains in the contract. *The effect of such a loan contract is to make it wholly void and subject to cancellation by a court of equity.* Furthermore, the statute makes the lending of money on such terms a criminal offense, *and a contract of that nature is therefore void as against the public policy of the state as established by its Legislature.*"

It is respectfully contended that, in view of the undisputed testimony of Certified Public Accountant Ulmer (Tr. 764, Vol. VIII, R. 1419, A. 47-A. 51), as confirmed by the testimony of Banks' own witness, Certified Public Accountant Bullock, on cross-examination (Tr. 587, 588,

589, Vol. VII, R. 1239-1241, A. 39-A. 46), both to the effect that *the interest called for by the face of the note and taken as discount was in excess of twenty-five (25%) per-cent per annum*, and in view of the decisions hereinabove quoted, there can be no doubt that the Florida District Court was absolutely correct when it said:

> "The chancellor's findings of fact and conclusions as to the usurious character of this transaction *are amply supported by the record.* To demonstrate that there was usury from its inception would unduly extend an already lengthy opinion. *Suffice it to say that where a borrower receives a net of approximately $263,000 from a $442,400 loan, it requires little mathematical calculation to discern that something is amiss.*" (A. 25).

Similarly, the Chancellor was absolutely correct in regarding the March 20, 1957 documents void, because of usury in excess of twenty-five percent (25%). He did not avoid them because of the Unclean Hands Doctrine; rather, his application of the Unclean Hands Doctrine related to other matters, as his Partial Final Decree makes plain.

It is respectfully contended that Petitioners' Argument Point 4 presents no matter calling for review by this Court.

E. The Petitioner-Banks Were Joint Adventurers and Agents Each for the Other from the Inception of the Usurious Transaction.

The first premise implied in Petitioners' complex Argument Point 5 seems to be that there was no relationship between the two (2) Petitioner-Banks until after the usurious loan had been made. The second premise implied in their Argument Point 5 seems to be that the

State Court treated Petitioners as joint adventurers and agents only because of a participation agreement dated after the usurious loan was made.

Both of these premises are false. The evidence before the Chancellor proved without dispute that Petitioner-Banks were controlled by the same interests; that they had interlocking directors and officers; that a loan in the amount of $442,400.00 was in excess of the legal limit of The Coral Gables First National Bank, its limit being $200,000.00; that all member Banks of the Sottile chain, including The Coral Gables First National Bank and the Pan American Bank of Miami, generally understood that in the event one of them was called on for a loan in excess of its limits, another would participate therein; and that such participations were generally arranged prior to the actual extension of credit by the originating member Bank. As the Chancellor said in his Partial Final Decree (R. 1816, A. 6):

> "As of November 14, 1956, Constructors of Florida, Inc., was indebted to Coral Gables First National Bank in the amounts of $19,444.53 and $129,767.19, the unpaid balances then due on the equipment notes dated July of 1956, and in the amount of $60,000.00 on the interim loan. $202,562.38 was actually paid to Constructors of Florida, Inc., on account of the $442,400.00 loan of November 14, 1956, so that the actual net cash which had been paid over to Constructors of Florida, Inc., by Coral Gables First National Bank as of November 14, 1956, was $411,774.10. However, Pan American Bank of Miami, as participant in each of these three (3) loans, was debited by Coral Gables First National Bank with the sums of $19,444.53, $129,767.19 and $243,320.00, or a total of $392,531.72. Actually, therefore, *Coral Gables First National Bank was merely a conduit, and agent;* the new loan of $442,400.00 did not, ac-

cording to the books and records of Coral Gables First National Bank, increase the net amount of the indebtedness of Constructors of Florida, Inc.; rather, the net amount of indebtedness to Coral Gables First National Bank, after the new loan of $442,400.00, actually decreased from $209,211.62 to $19,242.38, a net decrease of $188,969.24. In other words, immediately prior to the consummation of the alleged $442,400.00 loan on November 14, 1956, Constructors of Florida, Inc., was indebted to Coral Gables First National Bank in the amount of $209,211.62; immediately after the consummation of the alleged $442,400.00 loan, Constructors of Florida, Inc., was indebted to Coral Gables First National Bank only in the small amount of $19,242.38. *By loaning $393,531.72 of the money of Pan American Bank of Miami, Coral Gables First National Bank decreased its outstanding loans by $188,969.24.*"[27]

The Chancellor went on to hold (R. 1-16, A. 9):

> "Inasmuch as the plaintiffs were joint adventurers, and agent and principal each of the other, * * *"

We have previously commented upon Petitioners' failure to supply this Court with a complete transcript of the Record. However, the Statement of Facts which we have presented is completely cross-referenced to the transcript of Record as it actually exists and the Record itself completely refutes the aforementioned premise of Petitioners' Argument Point 5.

Petitioners' Argument Point 5 contains further error. It would have this Court believe that the State Court applied State usury penalties to a National bank and avoided the application of the *Federal Statute on Usury*. Such is not the case. The Chancellor did specifically hold that because the transaction was void in its inception the *Federal Statute*, was inapplicable to give life to an instru-

ment that had no validity in its beginning; but the Florida District Court by the *1960 Florida District Court Opinion* modified the Chancellor's Partial Final Decree and held that pursuant to the *Federal Statute*, National Bank could recover its proportionate share of the unpaid principal of the note. The State Usury penalties were applied only to the State Bank.

Petitioners' Argument Point 5 states a question which has no relation whatsoever to the facts in the case to which it is sought to be applied. Petitioners' discussion, in connection with such Argument Point 5, of the various rules promulgated by the Comptroller of Currency is completely immaterial because, as stated by the *1960 Florida District Court Opinion* (119 So.2d 741):

> "* * * *A careful scrutiny of the proceedings that took place at the time of and subsequent to the making of the original loan indicates that by the device of participation, the State bank attempted to lend its funds through a chartered National bank without subjecting itself to the loss of its principal in the event that the loan was found to be usurious under § 687.07, Fla. Stat., F.S.A. The most that the State bank could lose if this device was unsuccessful, using the National bank as its conduit, would be double the interest actually received by the National bank or a forfeiture of interest that was to accrue.* * *"

It is, however, interesting to note that in citing *Opinion No. 9530 of the Comptroller of Currency*, Petitioners omit the very language which confirms our position that the loan was usurious in its inception. The paragraph of the Opinion immediately following that quoted by the Banks, reads as follows:

> "* * * R.S. 5197 (12 U.S.C. 84) limits the interest charges of national banks to the rate allowed by the

laws of the State * * * where the bank is located * * * except that where by the laws of any State a different rate is limited for banks organized under State laws', national banks located in that State may also charge such higher rate.

"The courts have held that *if a borrower is required to leave part of the proceeds of a loan on deposit with the lender, the transaction is usurious if the interest paid amounts to more than the legal interest on the sum actually available* for use by the borrower."

Thus, the Comptroller of Currency advised National banks that if they chose to make loans of the character made by The Coral Gables First National Bank, the Courts would hold the transaction to be usurious. The Florida Courts did exactly as the Comptroller had advised they would do, and imposed the penalty provided by *12 U.S.C., § 86*, or twice the interest collected by The Coral Gables First National Bank from Constructors of Florida, Inc. There was no violation of the *Federal Law* and there is no basis for Petitioners' requested review of the State Court decision.

XII

CONCLUSION

As we said when we concluded our Brief in Opposition before this Court in Case No. 559, when the veil of self-righteous hypocrisy of Petitioners' claims is pierced, there can be no question of the correctness of the holding by the District Court of Appeal of Florida, Third District, that:

"A careful scrutiny of the proceedings that took place at the time of and subsequent to the making of the original loan indicates that by the device of partici-

pation, the *State bank attempted to lend its funds through a chartered National bank without subjecting itself to the loss of its principal in the event that the loan was found to be usurious* under § 687.07, Fla. Stat., F.S.A. The most that the State Bank could lose, if this device was successful, using the National Bank as its conduit, would be double the interest actually received by the National Bank or a forfeiture of interest that was to accrue."

The Petition should be denied.

Respectfully submitted,

WILLIAM L. GRAY, JR.,
First Federal Building,
Miami 32, Florida,
Attorney for Respondent, American Surety Company of New York.

FULLER WARREN,
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By /s/ Tom Maxey,
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First Federal Building,
Miami 32, Florida,
Of Counsel for American Surety Company of New York.

XIII

PROOF OF SERVICE

I, WILLIAM L. GRAY, JR., one of the attorneys for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of February, A. D., 1962, I served a copy of the foregoing Brief for Respondents in Opposition to the Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District, together with a copy of the separate Appendix in Support of Brief of Respondents, on The Coral Gables First National Bank and Pan American Bank of Miami, Petitioners, by mailing copies thereof in duly addressed envelopes, with postage prepaid, to their respective attorneys of record, as follows:

To: W. G. WARD, Esquire,
c/o WARD & WARD,
duPont Building,
Miami 32, Florida,

Attorney for The Coral Gables First National Bank;

To: WILLIAM B. ROMAN, Esquire,
Pan American Bank Building,
Miami 32, Florida,

One of the Attorneys for Pan American Bank of Miami;

To: LEO L. FOSTER, Esquire (Air Mail, Postage Prepaid),
c/o MESSRS. CALDWELL, PARKER, FOSTER, MADIGAN, OVEN & MORIARTY,
Brock Building,
Tallahassee, Florida,

One of the Attorneys for Pan American Bank of Miami.

WILLIAM L. GRAY, JR.

FOOTNOTES

Numbers	Pages
1-8	i
9-19	ii
20-28	iii
29-41	iv
42-60	v
61-80	vi
81-88	vii
89	viii

FOOTNOTES

1. Testimony of Robert E. Lawrence, Certified Public Accountant, Tr. 308, Vol. IX, R. 1463.

2. Testimony of Richard R. Reynolds, Tr. 156, Vol. V, R. 805, Tr. 163, Vol. V, R. 812; testimony of Jim M. Lancaster, Jr., Tr. 179, Vol. V, R. 828, Tr. 286, Vol. VI, R. 934, Tr. 296, Vol. VI, R. 944, Tr. 843, Vol. IX, R. 1498; testimony of Earl L. Goodwin, Tr. 435, Vol. VII, R. 1083.

3. Testimony of Richard R. Reynolds, Tr. 119, Vol. V, R. 768, Tr. 144, Vol. V, R. 793; testimony of Earl L. Goodwin, Tr. 435, Vol. VII, R. 1083, Tr. 436, Vol. VII, R. 1084

4. Testimony of Robert E. Lawrence, Certified Public Accountant, Tr. 809, Vol. IX, R. 1464, Tr. 812, Vol. IX, R. 1467, Tr. 829, Vol. IX, R. 1484, Tr. 832, Vol. IX, R. 1487.

5. Testimony of Robert E. Lawrence, Certified Public Accountant, Tr. 800, Vol. VIII, R. 1455, Tr. 830, Vol. IX, R. 1485, Tr. 832, Vol. IX, R. 1487; testimony of Earl L. Goodwin, Tr. 433, Vol. VII, R. 1081, Tr. 434, Vol. VII, R. 1082; testimony of William L. Pallot, Tr. 750, Vol. VIII, R. 1404; testimony of Richard R. Reynolds, Tr. 144, Vol. V, R. 793, Tr. 145, Vol. V, R. 794; testimony of Jim M. Lancaster, Jr., Tr. 178, Vol. V, R. 827.

6. Testimony of Robert E. Lawrence, Certified Public Accountant, Tr. 806, Vol. IX, R. 1461, Tr. 807, Vol. IX, R. 1462, Tr. 837, Vol. IX, R. 1492, computed as follows:

Capital (Tr. 806, Vol. IX, R. 1461)	$247,340.00
Tax Provision (Tr. 807, Vol. IX, R. 1462)	170,981.67
Profit sharing provision (Tr. 807, Vol. IX, R. 1462)	24,675.00
Contemplated investment	400,000.00
Total Book Net Worth	$842,996.67

7. Testimony of Robert E. Lawrence, Certified Public Accountant, Tr. 836, Vol. IX, R. 1491, Tr. 837, Vol. IX, R. 1492.

8. Testimony of Jim M. Lancaster, Jr., Tr. 256, Vol. VI, R. 904, Tr. 257, Vol. VI, R. 905; testimony of Richard R. Reynolds, Tr. 144, Vol. V, R. 793, Tr. 145, Vol. V, R. 794; testimony of

Earl L. Goodwin, Tr. 433, Vol. VII, R. 1081, Tr. 434, Vol. VII, R. 1082; testimony of Robert E. Lawrence, Certified Public Accountant, Tr. 801, Vol. IX, R. 1456; testimony of William L. Pallot, Tr. 752, Vol. VIII, R. 1406.

9. Original amount of $22,222.32, less three (3) payments of $925.23 each; see also Ex. #2.

10. Original amount of $148,305.36, less three (3) payments of $6,179.39 each; see also Ex. #4.

11. Testimony of Jim M. Lancaster, Jr., Tr. 257, Vol. VI, R. 905, Tr. 259, Vol. VI, R. 907, Tr. 179, Vol. V, R. 828, Tr. 180, Vol. V, R. 829; testimony of Richard R. Reynolds, Tr. 144, Vol. V, R. 793, Tr. 145, Vol. V, R. 794; testimony of Earl L. Goodwin, Tr. 434, Vol. VII, R. 1082.

12. Testimony of Jim M. Lancaster, Jr., Tr. 258, Vol. VI, R. 906; testimony of Richard R. Reynolds, Tr. 145, Vol. V, R. 794; testimony of Earl L. Goodwin, Tr. 434, Vol. VII, R. 1082, Tr. 436, Vol. VII, R. 1084.

13. Testimony of Jim M. Lancaster, Jr., Tr. 258, Vol. VI, R. 906, Ex. 17.

14. Testimony of Earl L. Goodwin, Tr. 434, Vol. VII, R. 1082; testimony of Richard R. Reynolds, Tr. 143, Vol. V, R. 792, Tr. 144, Vol. V, R. 793.

15. Testimony of Earl L. Goodwin, Tr. 434, Vol. VII, R. 1082, Tr. 435, Vol. VII, R. 1083, Tr. 436, Vol. VII, R, 1084; testimony of Richard R. Reynolds, Tr. 143, Vol. V, R. 792, Tr. 144, Vol, V, R. 793.

16. Testimony of Jim M. Lancaster, Jr., Tr. 259, Vol. VI, R. 907, Tr. 260, Vol. VI, R. 908, Tr. 261, Vol. VI, R. 909, Tr. 174, Vol. V, R. 823, Tr. 183, Vol. V, R. 830; Ex. 17.

17. Testimony of Jim M. Lancaster, Jr., Tr. 283, Vol. VI, R. 931, Tr. 260, Vol. VI, R. 908; testimony of Richard R. Reynolds, Tr. 143, Vol. V, R. 792, Tr. 904, Vol. IX, R. 1560.

18. Ex. #6; testimony of H. P. McGoogan, Tr. 82, Vol. V, R. 731, Tr. 74, Vol. V, R. 723.

19. Testimony of James Sottile, Jr., Tr. 679, Vol. VIII, R. 1332; Ex. AT, Deposition of Eduardo Morales, Page 14.

20. Testimony of James Sottile, Jr., Tr. 680, Vol. VIII, R. 1333; Ex. AT, Deposition of Eduardo Morales, Page 19, Page 30, Page 37, Page 40.

21. Testimony of James Sottile, Jr., Tr. 679, Vol. VIII, R. 1332; Ex. AT, Deposition of Eduardo Morales, Page 15.

22. See note 9.

23. See note 10.

24.	Principal of note		$442,400.00
	Discount	$ 44,240.00	
	Collateral Ac. #1	135,597.62	
	Payment interim note	60,000.00	$239,837.62
	Net paid		$202,562.38

25.	$ 19,444.53	
	129,767.19	
	60,000.00	
	202,562.38	
	$411,774.10	

26.	Participation certificate IL1 of Ex. 27	$ 19,444.53
	Participation certificate IL2 of Ex. 27	129,767.19
	Participation certificate Ex. 50	243,320.00
	Total	$392,531.72

See also Ex. AT, deposition of Eduardo Morales, page 11.

27.	(See note 9)	$ 19,444.53	
	(See note 10)	129,767.19	
	Interim loan	60,000.00	
	Outstanding 11/13/56		$209,211.72
	Additional out of pocket, $442,400.00 loan (See note 24)	202,562.38	
		$411,774.10	
	Less, participation credits (see note 26)	392,531.72	
	Remaining indebtedness	19,242.38	19,242.38
	Reduction in indebtedness		$189,969.34

28. Testimony of Earl L. Goodwin, Tr. 397, Vol. VI, R. 1045; testimony of Jim M. Lancaster, Jr., Tr. 184, Vol. V, R. 831, Tr. 261, Vol. VI, R. 909; testimony of Richard R. Reynolds, Tr. 117, Vol. V, R. 766.

29. Testimony of Earl L. Goodwin, Tr. 397, Vol. VI, R. 1045; testimony of Jim M. Lancaster, Jr., Tr. 184, Vol. V, R. 831; testimony of Richard R. Reynolds, Tr. 114, Vol. V, R. 763, Tr. 117, Vol. V, R. 766.

30. Ex. 27, Interoffice Memo, W. J. Klug to H. P. McGoogan, dated September 11, 1957; testimony of Richard R. Reynolds, Tr. 145, Vol. V, R. 794; testimony of H. P. McGoogan, Tr. 88, Vol. V, R. 737, Tr. 88, Vol. V, R. 737, Tr. 89, Vol. V, R. 738.

31. Ex. 27, Signature Card, Collateral Account #1, Tr. 266, Vol. VI, R. 914.

32. Ex. 27, Interoffice Memo, W. J. Klug to H. P. McGoogan, dated Sept. 11, 1957; Ex. 27, ledger card for Collateral Account #1; Ex. 47, Special Report of Pentland, Purvis, Keller & Co.; testimony of Earl L. Goodwin, Tr. 437, Vol. VII, R. 1085.

33. Ex. 33.

34. Testimony of Jim M. Lancaster, Jr., Tr. 262, Vol. VI, R. 910, Tr. 263, Vol. VI, R. 911, Tr. 264, Vol. VI, R. 912, Tr. 265, Vol. VI, R. 913; testimony of Earl L. Goodwin, Tr. 404, Vol. VII, R. 1052, Tr. 405, Vol. VII, R. 1053, Tr. 406, Vol. VII, R. 1054, Tr. 407, Vol. VII, R. 1055, Tr. 408, Vol. VII, R. 1056, Tr. 409, Vol. VII, R. 1057, Tr. 426, Vol. VII, R. 1074, Tr. 427, Vol. VII, R. 1075, Tr. 428, Vol. VII, R. 1076, Tr. 429, Vol. VII, R. 1077, Tr. 430, Vol. VII, R. 1078.

35. See note 34.

36. See note 34.

37. Testimony of Earl L. Goodwin, Tr. 438, Vol. VII, R. 1086; testimony of Jim M. Lancaster, Jr., Tr. 263, Vol. VI, R. 811.

38. Testimony of Jim M. Lancaster, Jr., Tr. 271, Vol. VI, R. 919; Ex. 27, Signature card to Collateral Account #2.

39. Testimony of Jim M. Lancaster, Jr., Tr. 271, Vol. VI, R. 919.

40. Testimony of Jim M. Lancaster, Jr., Tr. 257, Vol. VI, R. 905, Tr. 258, Vol. VI, R. 906, Tr. 259, Vol. VI, R. 907, Tr. 189, Vol. V, R. 836.

41. Testimony of Richard R. Reynolds, Tr. 143, Vol. V, R. 792, Tr. 144, Vol. V, R. 793; testimony of Jim M. Lancaster, Jr., Tr. 190, Vol. V, R. 837.

42. Ex. 47; Ex. 27, Ledger card Collateral Account #1.

43. Ex. 49; Ledger Sheets, Collateral Account #2.

44. Ex. 49, Ledger Sheets, Collateral Account #2.

45. Testimony of Jim M. Lancaster, Jr., Tr. 276, Vol. VI, R. 924

46. Testimony of Richard R. Reynolds, Tr. 148, Vol. V, R. 797.

47. Testimony of Richard R. Reynolds, Tr. 148, Vol. V, R. 797

48. Testimony of Richard R. Reynolds, Tr. 118, Vol. V, R. 767, Tr. 119, Vol. V, R. 768, Tr. 148, Vol. V, R. 797; Tr. 150, Vol. V, R. 799, Tr. 153, Vol. V, R. 802; Testimony of Jim M. Lancaster, Jr., Tr. 203, Vol. VI, R. 850; Ex. 19; Testimony of Earl L. Goodwin, Tr. 443, Vol. VII, R. 1091.

49. Testimony of Earl L. Goodwin, Tr. 446, Vol. VII, R. 1094, Tr. 450, Vol. VII, R. 1098.

50. Testimony of Earl L. Goodwin, Tr. 446, Vol. VII R. 1094

51. Testimony of Earl L. Goodwin, Tr. 447, Vol. VII, R. 1095, Tr. 450, Vol. VII, R. 1098, Tr. 453, Vol. VII, R. 1101.

52. Testimony of Earl L. Goodwin, Tr. 447, Vol. VII, R. 1095

53. Testimony of H. P. McGoogan, Tr. 99, Vol. V, R. 748; Testimony of Esten A. Ulmer, Tr. 772, Vol. VIII, R. 1427.

54. Testimony of Earl L. Goodwin, Tr. 472, Vol. VII, R. 1120. Testimony of Richard R. Reynolds, Tr. 150, Vol. V, R. 799, Tr. 151, Vol. V, R. 800.

55. Testimony of Richard R. Reynolds, Tr. 151, Vol. V, R. 800

56. Testimony of Earl L. Goodwin, Tr. 443, Vol. VII, R. 1091, Tr. 445, Vol. VII, R. 1093; Testimony of Richard R. Reynolds, Tr. 154, Vol. V, R. 803; Testimony of Jim M. Lancaster, Jr., Tr. 868, Vol. IX, R. 1523, Tr. 869, Vol. IX, R. 1524.

57. Testimony of Richard R. Reynolds, Tr. 157, Vol. V, R. 806.

58. Ex. 41; Ex. 42; Ex. 43.

59. Testimony of Tom Maxey, Tr. 314, Vol. VI, R. 962

60. Testimony of Tom Maxey, Tr. 314, Vol. VI, R. 962; Testimony of Frederick A. Carroll, Tr. 988, Vol. IX, R. 1645

61. Testimony of Jim M. Lancaster, Jr., Tr. 256, Vol. VI, R. 904.

62. Exhibit M.

63. Testimony of Jim M. Lancaster, Jr., Tr. 275, Vol. VI, R. 923; Testimony of Tom Maxey, Tr. 352, Vol. VI. R. 1000, Tr. 353, Vol. VI. R. 1001.

64. Testimony of Tom Maxey, Tr. 314, Vol. VI, R. 962.

65. Testimony of Tom Maxey, Tr. 314, Vol. VI, R. 962.

66. Testimony of Frederick A. Carroll, Tr. 992, Vol. IX, R. 1649; Testimony of Tom Maxey, Tr. 314, Vol. VI, R. 962, Tr. 315, Vol. VI, R. 963.

67. Testimony of Tom Maxey, Tr. 347, Vol. VI, R. 995; Testimony of Frederick A. Carroll, Tr. 992, Vol. IX, R. 1649.

68. Testimony of Tom Maxey, Tr. 347, Vol. VI, R. 995; Testimony of Frederick A. Carroll, Tr. 992, Vol. IX, R. 1649.

69. Testimony of Frederick A. Carroll, Tr. 992, Vol. IX, R. 1649, Tr. 994, Vol. IX. R. 1651, Tr. 1042, Vol. X, R. 1699.

70. Testimony of Frederick A. Carroll, Tr. 1059, Vol. X, R. 1716, Tr. 1060, Vol. X. R. 1717; Testimony of Tom Maxey, Tr. 317, Vol. VI, R. 965.

71. Testimony of Tom Maxey, Tr. 317, Vol. VI, R. 965.

72. Testimony of Frederick A. Carroll, Tr. 992, Vol. IX, R. 1649, Tr. 1044, Vol. IX, R. 1701.

73. Ex. 8; Testimony of Frederick A. Carroll, Tr. 1044, Vol. IX, R. 1701.

74. Ex. 28; Testimony of Frederick A. Carroll, Tr. 1044, Vol. IX, R. 1701.

75. Testimony of Tom Maxey, Tr. 355, Vol. VI, R. 1003.

76. Testimony of Tom Maxey, Tr. 355, Vol. VI, R. 1003.

77. Testimony of Earl L. Goodwin, Tr. 473, Vol. VII, R. 1121.

78. Ex. 41; Ex. 42; Ex. 43.

79. Testimony of H. P. McGoogan, Tr. 108, Vol. V, R. 757.

80. Ex. 29, page 10.

81. Florida Statutes, Secs. 687.03, 687.04, 687.07.

82. Testimony of Esten A. Ulmer, Certified Public Accountant, Tr. 775, Vol. VIII, R. 1430; Ex. 47, Schedule #2.

83. Testimony of Esten A. Ulmer, Certified Public Accountant, Tr. 764, Vol. VIII, R. 1419.

84. Testimony of Esten A. Ulmer, Certified Public Accountant, Tr. 764, Vol. VIII, R. 1419.

85. Ex. 8.

86. Ex. 11.

87. Testimony of Esten A. Ulmer, Certified Public Accountant, Tr. 774, Vol. VII, R. 1429.

88. Ex. 29, pages C-2, GC 21, GC 23, GC 24.

89. COMPUTATION OF REDUCTION OF NATIONAL BANK'S EXTENSION OF CREDIT TO CONSTRUCTORS AS A RESULT OF LOANING THE MONEY OF STATE BANK

Indebtedness of Constructors to National Bank Immediately Prior to the $442,400.00 Loan:

Amount owed by Constructors to The Coral Gables First National Bank on equipment loan after 3 payments of $925.23 each (Pl. Ex. 2)	$ 19,444.53	
Amount owed to The Coral Gables First National Bank on equipment loan after 3 payments of $6,179.39 each (Pl. Ex. 4)	129,767.19	
Interim loan from Coral Gables bank to Constructors	60,000.00	
Outstanding as of November 13, 1958 (1 day before the $442,400.00 loan)		$209,211.72

Add, Additional Net Indebtedness From Disbursement of $442,400.00 Loan:

Principal of loan		$442,400.00	
Discount	$ 44,240.00		
Collateral Acct. #1	135,597.62		
Payment interim loan	60,000.00	239,837.62	202,562.38
Total Indebtedness to Both Banks			$411,774.10

Less, Amounts Loaned by State Bank:

Part. cert. IL1 (Pl. Ex. 27)	$ 19,444.53		
Part. cert. IL2 (Pl. Ex. 27)	129,767.19		
Part. cert. (Pl. Ex. 50)	243,320.00		392,531.72
Amount Due to National Bank			$19,242.38

Net Reduction in National Bank's Outstanding Loans As a Result of Loaning State Bank's Money to Constructors:

By getting Pan American Bank of Miami to issue the above participation certificates, The Coral Gables First National Bank reduced the indebtedness owed to it by Constructors to $19,242.38. This financial maneuver benefited The Coral Gables First National Bank by $189,969.34, i. e.:

Amount owed by Constructors to The Coral Gables First National Bank before the $442,400.00 loan	$209,211.72	
Amount owed by Constructors to The Coral Gables First National Bank after the $442,400.00 loan and participation of Pan American Bank of Miami	19,242.38	
	$189,969.34	

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 621

THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America having its principal place of business in the City of Coral Gables, Florida, and PAN AMERICAN BANK OF MIAMI, a banking institution organized and existing under the laws of the State of Florida, having its principal place of business in the City of Miami, Dade County, Florida,

Petitioners,

vs.

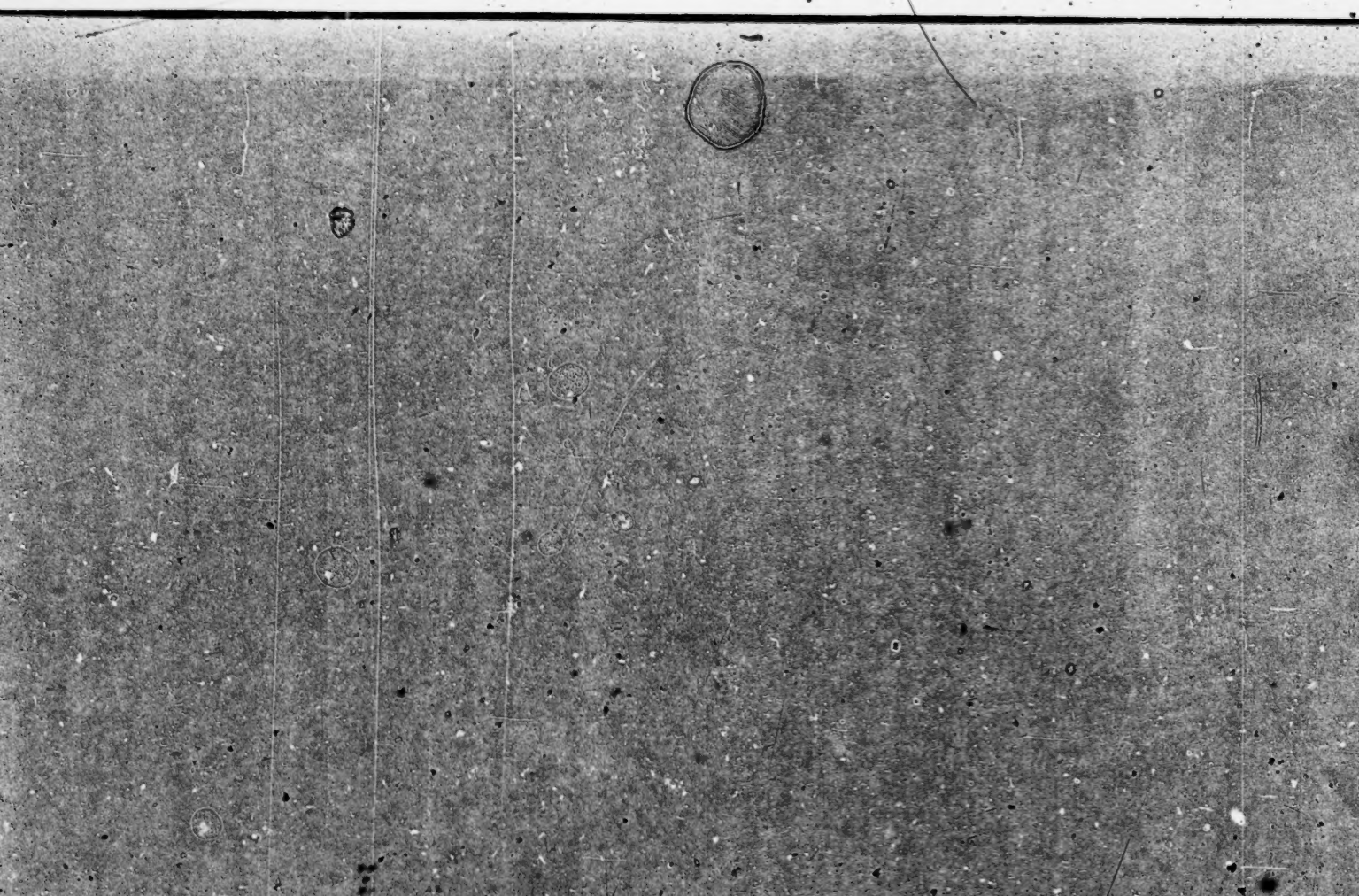
CONSTRUCTORS OF FLORIDA, INC., a Florida corporation having its principal place of business in the City of Coral Gables, Dade County, Florida, and JOHN NICHOLAS, as Trustee under Chapter X, Federal Bankruptcy Reorganization Proceedings now pending in the United States District Court, Southern District of Florida, CITY OF WEST PALM BEACH, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation authorized to do business in the State of Florida, TOM MAXEY, RUSSELL A. ORTMAYER, RICHARD R. REYNOLDS, JIM M. LANCASTER, JR., EARL L. GOODWIN, ISLAND CONSTRUCTION COMPANY, a corporation organized under the laws of Puerto Rico and having its principal place of business in Dade County, Florida, H. S. FLAGG and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

APPENDIX IN SUPPORT OF BRIEF FOR RESPONDENTS IN OPPOSITION

R. L. MIDKIFF, Inc., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 621

THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America, having its principal place of business in the City of Coral Gables, Florida, and PAN AMERICAN BANK OF MIAMI, a banking institution organized and existing under the laws of the State of Florida, having its principal place of business in the City of Miami, Dade County, Florida,

Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation having its principal place of business in the City of Coral Gables, Dade County, Florida, and JOHN NICHOLAS, as Trustee under Chapter X, Federal Bankruptcy Reorganization Proceedings now pending in the United States District Court, Southern District of Florida, CITY OF WEST PALM BEACH, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida, AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation authorized to do business in the State of Florida, TOM MAXEY, RUSSELL A. ORTMAYER, RICHARD R. REYNOLDS, JIM M. LANCASTER, JR., EARL L. GOODWIN, ISLAND CONSTRUCTION COMPANY, a corporation organized under the laws of Puerto Rico and having its principal place of business in Dade County, Florida, H. S. FLAGG and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

APPENDIX IN SUPPORT OF BRIEF FOR RESPONDENTS IN OPPOSITION

PARTIAL FINAL DECREE OF TRIAL COURT

Dated June 26, 1958 (R. 1814) — As Amended July 2, 1958 (R. 1827).

THIS CAUSE coming on to be tried before the Court and The Coral Gables First National Bank, the Pan American Bank of Miami, Constructors of Florida, Inc., City of West Palm Beach, American Surety Company of New York, Richard R. Reynolds, James M. Lancaster, Jr., Earl L. Goodwin, Russell A. Ortmayer, Harold S. Flagg and Tom Maxey having presented their testimony together with that of their witnesses and presented the documentary exhibits to be considered by the Court, and after consideration of the matter, the briefs of counsel, the Court

FINDS:

On September 20, 1957, the Coral Gables First National Bank, and the Pan American Bank of Miami, as Plaintiffs, filed their Bill of Complaint against Constructors of Florida, Inc., City of West Palm Beach, American Surety Company of New York, Richard R. Reynolds, Jim M. Lancaster, Jr., Earl L. Goodwin, Island Construction Company, Pecon Construction Company, J. C. Bledsoe, Russell A. Ortmayer, Harold S. Flagg, Tom Maxey, and the United States of America, as defendants, seeking to foreclose three (3) chattel mortgages, in the amount of $13,888.95, $92,690.85, and $151,802.46, and to impose liability for any deficiency on American Surety Company of New York and the City of West Palm Beach.

All defendants who were served with process filed their answers denying liability; and, in addition, setting up counterclaims against the Banks.

Constructors of Florida, Inc., and Messrs. Reynolds, Lancaster, Goodwin, by their counterclaim, alleged that the larger of the three (3) loans sought to be foreclosed, in the original principal amount of $442,400.00 was in fact usurious; that the Banks breached their contract to loan money to Constructors of Florida, Inc., by withholding from Constructors of Florida, Inc., the major portion of the proceeds of said larger loan; and that by said breach the Banks impaired the working capital of Constructors of Florida, Inc., thus ruining Constructors of Florida, Inc., and causing substantial damages; moreover, that the Banks, as a part of their conspiracy and scheme to collect usurious interest, caused Messrs. Reynolds, Lancaster, and Goodwin to decline a *bona fide* offer to purchase forty (40%) percent of the stock of Constructors of Florida, Inc., for the sum of $400,000.00 all to the damage of Constructors of Florida, Inc., and its principals, in the amount of $3,674,480.76 as to the corporation, and $2,342,379.19 as to its principals.

American Surety Company of New York, in addition to adopting the allegations of the counterclaim filed by Constructors of Florida, Inc., and its principals, also by its counterclaim, alleged fraud and deceit on the part of the Banks, in that the Banks gave to American Surety Company of New York false and fraudulent information concerning the financial condition of Constructors of Florida, Inc., which information American Surety Company of New York believed and acted upon, thus causing American Surety Company of New York to refrain from taking action to prevent losses on its then outstanding bonds, and, further causing American Surety Company of New York

to write additional bonds on the strength of the credit and quick assets of Constructors of Florida, Inc., all to the damage of American Surety Company of New York in the amount of $1,367,379.19.

The City of West Palm Beach, in its counterclaim, adopted the factual allegations of the counterclaims filed by the other defendants and counterclaimants, and alleged that the actions of the Banks were the direct and proximate cause of the City's being forced to take over the contracts held by Constructors of Florida, Inc., with the City of West Palm Beach, all to the damage of the City of West Palm Beach in the amount of $279,423.58.

John Nicholas, as Receiver in Bankruptcy of Constructors of Florida, Inc., was allowed to intervene by the Court and filed his answer and counterclaim against the Plaintiffs and adopted the pleadings; answer and counterclaim filed in the cause on behalf of Constructors of Florida, Inc., together with answer and counterclaims directed against the other Defendants.

Pecon Construction Company and J. C. Bledsoe were never served with process.

The trial of the first phase of the suit was limited to the primary issues between the principal parties.

Constructors of Florida, Inc., a Florida corporation was organized in 1955 with Richard R. Reynolds, Jim M. Lancaster, Jr., and Earl L. Goodwin as principals. The Corporation was very busy and in October, 1956, it was engaged in the completion of some eighteen (18) municipal, state and federal governmental contracts throughout the State of Florida, having a total value of about $3,800,000.00. The Corporation needed a large amount of working capital. In negotiations between the Corporation and The Coral Gables First National Bank, a loan was entered into on

November 14, 1956, in the principal amount of $442,440.00, repayable at $3,000.00 per month principal; plus interest at 5% per annum for twenty-three (23) months with a balloon or final payment on the twenty-fourth month of $373,400.00, plus interest at 5% per annum. This loan was secured by chattel mortgage on all motors and equipment of the Corporation and by "assignment" of payments due from the City of West Palm Beach to the Corporation on sewer contracts 7 and 9. At that time the Corporation was indebted to The Coral Gables First National Bank on account of the remaining principal balance of two equipment payment consolidating loans made in July, 1956, in the amounts of $19,444.53 and $129,767.19 or a total of $149,211.72. Preliminary to the large loan of November 14, 1956, the Banks also granted a $60,000.00 interim loan to the Corporation on October 5, 1956. This interim loan was secured by a corporate resolution directing the City of West Palm Beach to mail checks payable to Constructors of Florida, Inc., for work done on contracts 7 and 9 to The Coral Gables First National Bank. This resolution plus agreement to so mail said checks by the City of West Palm Beach constituted the "assignment" referred to above.

The Coral Gables First National Bank in making the loan of $442,400.00 actually paid to Constructors of Florida, Inc., $202,562.38, since they paid to themselves from the proceeds of the loan the existing $60,000.00 indebtedness of the Corporation. In addition, the Banks deducted $44,240.00 as a commitment fee and $44,854.44 as discount or interest paid in advance. Furthermore $90,743.18, was deposited in a new account called "Collateral Account No. 1", which was a controlled account requiring the signature of a Vice-President of the Banks and an officer of Constructors of Florida, Inc. Upon the Corporation's asking the Banks for an explanation of these charges, it was explained

that there was an error in making the commitment fee charge of $44,854.44 and that this amount would be paid into Collateral Account No. 1. This was done increasing this account to a total balance of $135,597.62. The Banks further stated that the charge of $44,240.00 would be treated as pre-paid interest, *i. e.*, 5% per year for two years or a total of 10%. The face of the $442,400.00 note provided only for interest at the rate of 5% per annum, payable monthly for twenty-three months with the small $3,000.00 per month principal payment with the balance of interest and principal due on the twenty-fourth month. The discount interest charge was in addition to the interest rate shown on the face of the note.

The Coral Gables First National Bank also created "Collateral Account No. 2", which was a controlled account requiring the joint signature of an officer of the Banks and of the Corporation, and into this account was paid on November 29, 1956, $36,488.11; December 24, 1956, $42,750.32; January 24, 1957, $53,247.39; February 26, 1957, $24,168.04; and on March 1, 1957, $37,502.25, making a total of $194,156.11, all as payments made to Constructors of Florida, Inc., by the City of West Palm Beach. The understood terms of the loan at the time of its making did not contemplate such controlled accounts and there are no such provisions set forth in any contract documents.

During the months of December, 1956 and January, 1957, the affairs of Constructors of Florida, Inc., appeared to progress well. From time to time, the Corporation called upon the Banks to release to their use certain of the funds held by the Banks in Collateral Account No. 1.

These requests were granted and the entire amount originally withheld in Collateral Account No. 1 was paid over to Constructors of Florida, Inc., by January 7, 1957.

During the time of these advances from Collateral Account No. 1, the Banks had received and deposited in Collateral Account No. 2, the sum of $122,749.34, and by the end of February, 1957, a net balance of $179,540.67; the Banks receiving in Collateral Account No. 2 more money than disbursed from Collateral Account No. 1. About this time the Corporation requested the Banks to advance $100,000.00 of the amount held in Collateral Account No. 2, which the Banks claimed was being held as additional security and which the Corporation thought was capital available for its use. Through continuous negotiations between the Corporation and the Banks, the request was reduced to $50,000.00 and indications were made by the Banks that it would be granted. On March 4, 1957, an officer of the Corporation left a signed check, in blank and undated, with the Banks so that funds in the amount of $50,000.00 could be deposited in the corporate account and withdrawn by the Corporation on the following day. The Banks, however, completed the check for the total amount remaining in Collateral Account No. 2 of $179,540.67 and without the knowledge or consent of the Corporation applied the same to the reduction of the face amount of the $442,400.00 loan. The Banks had, up to this time, apparently thought that the Corporation loans were secured by guarantee of the American Surety Company of New York and on March 4, 1957, realized that this was not true in fact.

When the $442,400.00 loan was made, it was beyond the legal lending limits of The Coral Gables First National Bank.

As of November 14, 1956, Constructors of Florida, Inc., was indebted to Coral Gables First National Bank in the amounts of $19,444.53 and $129,767.19, the unpaid balances then due on the equipment notes dated July of 1956, and in the amount of $60,000.00 on the interim loan. $202,-

562.38 was actually paid to Constructors of Florida, Inc., on account of the $442,400.00 loan of November 14, 1956, so that the actual net cash which had been paid over to Constructors of Florida, Inc., by Coral Gables First National Bank, as of November 14, 1956, was $411,774.10. However, Pan American Bank of Miami, as participant in each of these three (3) loans, was debited by Coral Gables First National Bank with the sums of $19,444.53, $129,767.19, and $243,320.00, or a total of $392,531.72. Actually, therefore Coral Gables First National Bank was merely a conduit, and agent; the new loan of $442,400.00 did not, according to the books and records of Coral Gables First National Bank, increase the net amount of the indebtedness of Constructors of Florida, Inc., rather the net amount of indebtedness to Coral Gables First National Bank, after the new loan of $442,400.00, actually decreased from $209,211.62 to $19,242.38, a net decrease of $188,969.24. In other words, immediately prior to the consummation of the alleged $442,400.00 loan on November 14, 1956, Constructors of Florida, Inc., was indebted to Coral Gables First National Bank in the amount of $209,211.62; immediately after the consummation of the alleged $442,400.00 loan, Constructors of Florida, Inc., was indebted to Coral Gables First National Bank only in the small amount of $19,242.38. By loaning $393,531.72 of the money of Pan American Bank of Miami, Coral Gables First National Bank decreased its outstanding loans by $188,969.24.

In early March of 1957, Constructors of Florida, Inc., was in financial difficulty finding itself unable to meet the current payroll. After the Coral Gables First National Bank had applied $179,540.67, the balance of Collateral Account No. 2, to the payment of the outstanding loan, a meeting was held by the officials of the Coral Gables First National Bank, Pan American Bank of Miami, Construc-

tors of Florida, Inc., and American Surety Company of New York. Mr. Eduardo Morales of Pan American Bank, Mr. Riley and Mr. McGoogan of The Coral Gables First National Bank, Messrs. Reynolds, Lancaster and Goodwin for the Corporation and Mr. Harold S. Flagg for the Surety Company participated in a general discussion of the financial position of the various parties at that time. It was then agreed that out of the remaining amounts to be collected on the City of West Palm Beach sewer contracts 7 and 9, approximately 65% thereof would be deposited into a controlled trust account to be used by Constructors of Florida, Inc. The loan repayment agreement of March 20, 1957, was executed together with the renewal contract note of that date in the amount of $218,275.25 providing for a straight 15% interest per annum. A usury release was executed together with personal guarantees by the three officers of Constructors of Florida, Inc. These documents were executed under compulsion and force of the precarious financial circumstances then existing due to the wrongful manner in which the loan accounts had been handled by the Plaintiff-Banks, are void and without consideration.

The Corporation never recovered from this point on and shortly thereafter complete default occurred on contracts and corporate business.

The Plaintiff-Banks, on account of the loan of $442,400.00 of November 14, 1956, had actually charged Constructors of Florida, Inc., total interest in the amount of $49,855.44, which is fifty-six and 27/100ths (56.27%) percent per annum on the actual moneys disbursed to Constructors of Florida, Inc., on account of said loan, based on a 365 day year, or fifty-five and 5/10ths (55.5%) percent per annum based on a 360 day year.

The total interest reserved on the face of the note, when added to the $44,240.00 retained by the Banks as interest taken in advance, discount, or commitment fee, amounted to a total of $85,029.92 actually reserved, charged, or taken by the Banks.

The transfer of $135,597.62 by the Banks on November 14, 1956, to Collateral Account No. 1, a controlled account requiring the signature of an officer of the Banks, was not a payment to the account of the Corporation for which interest could be charged. Title to the funds did not belong to the Corporation until delivered to them free of control.

The payments by the City of West Palm Beach in periodical installments between November 29, 1956 and March 1, 1957, of $194,156.11 into Collateral Account No. 2, a controlled account requiring the signature of an officer of the Banks, did amount to payments to the Banks of cash collateral requiring a rebate of interest charged on like amounts outstanding.

It appears that under any lawful and reasonable contention the Banks charged Constructors of Florida, Inc., at least thirty-eight and 40 100ths (38.40%) percent interest on the $442,400.00 loan and fifty-six and 27 100ths (56.27%) percent if you use only the actual amount of the said loan which was made available to the uncontrolled account of Constructors of Florida, Inc. It seems without question that the interest charged and reserved exceeds twenty-five (25%) percent per annum.

It therefore follows that under Secs. 687.04 and 687.07, Florida Statutes, 1957, the notes and mortgages sued upon by the Plaintiff-Banks are void and of no force and effect.

Inasmuch as the Plaintiffs were joint adventurers, and agent and principal each for the other, each is liable for

the total amount of such damage, and the Federal Banking Code has no application to prevent imposition of the statutes of the State of Florida as to usury penalties. Accordingly, Plaintiff Coral Gables First National Bank is liable, either to Constructors of Florida, Inc., or to its Receiver, under the terms of the Federal Banking Code (12 U.S.C.A., Sec. 86), and Plaintiff Pan American Bank of Miami is liable, either to Constructors of Florida, Inc., or to its Receiver, under the terms of Sec. 687.07, Florida Statutes, 1957, as follows:

(a) Liability of Coral Gables First National Bank		
(1) For double the interest collected prior to March 20, 1957, in the amount of $49,855.44, as per Schedule 1, Pentland, Purvis, Keller & Co. audit, Plaintiffs' Exhibit No. 47		$ 99,710.88
(2) For double the interest collected subsequent to March 20, 1957, in the amount of $5,370.35, per note jackets covering the renewal contract note, Defendants' Exhibits I and J		10,740.70
		$110,451.58
Less amount credited to principal on renegotiation		35,584.06
Total due by Coral Gables First National Bank		$74,867.52
(b) Liability of Pan American Bank of Miami.		
(1) For the principal and interest paid prior to March 20, 1957, as per Schedule 1, Pentland, Purvis, Keller & Co. audit, Plaintiffs' Exhibit No. 47		$194,156.11

(2) For the principal paid subsequent to March 20, 1957, as per note jackets (Defendants' Exhibits I and J) covering the portions of the renewal contract note ostensibly held by each of the Plaintiffs, and proved by the following computation:

Balance due as of March 20, 1957	$218,275.27	
Less, balance remaining due	151,802.46	
		66,472.81

(3) For the interest paid subsequent to March 20, 1957, as per the same note jackets (Defendants' Exhibits I and J) 5,370.35

Total principal and interest due by Pan American Bank of Miami (as per the above and as per testimony of Esten A. Ulmer, C.P.A., ending at Tr. 774) $265,999.27

(c) Liability of both Plaintiff-Banks.

For cancellation of principal and interest allegedly remaining due, as per note jackets (Defendants' Exhibits I and J), and testimony of Frank W. Colton, at Tr. 627, Tr. 650.

	Principal	Interest	Total	
Jacket I	$136,622.22	$18,733.34	$155,355.56	
Jacket J	15,180.24	2,049.49	17,229.73	
Total	$151,802.46	$20,782.83	$172,585.29	
				$172,585.29
Total Usury Damages				$513,452.08

At the time the Banks wrongfully applied the balance of $179,540.67 remaining in Collateral Account No. 2, to the reduction of the face amount due of the $442,400.00 loan,

neither of the notes of July 25, 1956 and July 24, 1956, held by the Banks and secured by chattel equipment mortgages, were due or in default. The action of the Banks helped bring about the subsequent defaults in these loans and the amount seized by the Banks from Collateral Account No. 2 was more than enough to pay said loans in full or keep them current and in good standing. The debts are still due on said notes by the Corporation to the Banks in the amounts of $14,326.77 and $95,636.77 principal and interest included to May 1, 1958, respectively, but the notes and mortgages are not in default and not subject to foreclosure in this action. They may be paid in accordance with their respective terms with principal payments held to be in abeyance from time of alleged default to time of the entry of complete Final Decree in this case. The lien of the mortgages securing said debts are unenforceable as the Banks are not in equity with clean hands. The lien of The City of West Palm Beach and American Surety Company of New York against such chattel and equipment of the Corporation are superior to any claims of the Banks asserted in this proceeding.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiff-Counter-Defendant Banks are solely responsible or liable for all damages suffered by Constructors of Florida, Inc., resulting from the collapse of its business and forfeiture of its contracts.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiff-Counter-Defendant Banks are solely responsible or liable for all damages suffered by Richard R. Reynolds, Jim M. Lancaster, Jr., and Earl L. Goodwin resulting from the loss of value of the stock of Constructors of Florida, Inc., loss

of profits, or liability on personal guarantees other than those given to said Banks.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiff-Counter-Defendant Banks are solely responsible or liable for all damages suffered by the City of West Palm Beach in connection with the completion of sewer contracts 7 and 9.

The evidence does show that the City of West Palm Beach did not agree in any way to guarantee any part of the loan made by the Banks to Constructors of Florida, Inc. There is no basis whatever for any equitable subrogation in favor of the Banks and against the City of West Palm Beach.

The evidence does show that the City of West Palm Beach is protected in the amounts expended to complete sewer contracts 7 and 9 by bonds written by the American Surety Company of New York. As secondary security, in case the American Surety Company of New York did not make good on said bonds, the City of West Palm Beach has an equitable lien, superior in right and dignity to any other lien or mortgages held by the Banks herein (except that of American Surety Company of New York after having made good on said bonds) covering all machinery and equipment of Constructors of Florida, Inc., located at West Palm Beach as of August 26, 1957.

The evidence is not sufficient to prove to the satisfaction of this Court by a preponderance that the Plaintiff-Counter-Defendant Banks are solely responsible or liable for all damages suffered by the American Surety Company of New York on account of the various bonds written and continued for Constructors of Florida, Inc., and Island Construction Co.

The evidence does show that the American Surety Company of New York did not agree in any way to guarantee any part of the loans made by the Banks to Constructors of Florida, Inc. There is no basis whatever for any equitable subrogation in favor of the Banks and against American Surety Company of New York.

The evidence further shows that Constructors of Florida, Inc., are indebted to American Surety Company of New York in the amount of $1,367,379.19 on account of the various bonds written and continued for said Corporation or guaranteed by said Corporation. This amount is secured by the General Indemnity Agreement held by the Surety Company.

The evidence further shows that the General Indemnity Agreement (marked Defendant's Exhibit B) provides that Constructors of Florida, Inc., pay to American Surety Company of New York all reasonable attorneys' fees, costs and expenses incurred by American Surety Company of New York in defense of any action brought on or in connection with any of the bonds written on behalf of Constructors of Florida, Inc. As a part of the consequential damages which proximately and naturally flow from the Banks' usurious charges and the improper manner in which the loan accounts were handled by them, such attorneys' fees are found to be a part of the damages which Constructors of Florida, Inc., should recover against the Banks in that Constructors of Florida, Inc., has obligated itself to pay such attorneys' fees to American Surety Company of New York. A reasonable fee is hereby fixed in the amount of $45,000.00.

The evidence further shows that under the terms and provisions of the mortgage which American Surety Company of New York is foreclosing by this action against

Constructors of Florida, Inc., is the principal amount of approximately $1,367,379.19. Constructors of Florida, Inc., is obligated to pay American Surety Company of New York such reasonable attorneys' fees as may be fixed by this Court for the foreclosure of said mortgage. The amount of these attorneys' fees are found to be a part of the consequential damages which proximately and naturally flow from the Banks' usurious charges and the improper manner in which the loan accounts were handled by them, and such attorneys' fees should be recovered by Constructors of Florida, Inc., from said Banks. A reasonable fee is hereby fixed in the amount of $27,347.58 (2% of amount foreclosed).

The charges and actions of the Banks in the handling of the loan accounts contributed materially to the collapse of Constructors of Florida, Inc., and the attorneys' fees fixed herein together with the costs of this proceeding should be and are taxed against said Banks.

The motions of the various parties made throughout the proceedings upon which ruling was reserved by the Court in two prior orders are all hereby denied.

This Partial Final Decree is subject to the undetermined claims and counterclaims of the "secondary issues" and parties not herein decided. A "Final Decree" will be issued by the Court at the conclusion of the entire matter implementing the findings made herein and disposing of all issues between all parties.

DONE AND ORDERED at Miami, Dade County, Florida, this 26th day of June, 1958.

/s/ GRADY L. CRAWFORD
Circuit Judge

OPINION OF DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

(Referred to in the Brief in Opposition as *"1960 Florida District Court Opinion"*)

(Filed March 22, 1960)

HORTON, Chief Judge.

In the main appeal, (#58-526) the appellants Coral Gables First National Bank and Pan American Bank of Miami, hereinafter referred to as Banks, seek review of a partial final decree, as amended, which adjudicated that a certain loan transaction between appellants and appellee Constructors of Florida, hereinafter referred to as Constructors, was usurious. American Surety Company of New York, hereinafter referred to as Surety, the City of West Palm Beach, hereinafter referred to as City, and Richard R. Reynolds, J. M. Lancaster, Jr., and Earl L. Goodwin, the individual officers of Constructors, hereinafter referred to as Individuals, have filed joinders in the main appeal, and, in addition, the following separate appeals have been filed seeking review of this same decree:

In appeal #58-542, appellants Constructors and Individuals contend that the chancellor erred in failing to award them damages in the form of losses sustained as a result of the Banks' action in effecting a loan with a usurious rate of interest and breach of a loan contract.

In appeal #58-543, appellant Surety contends that the chancellor erred in failing to award to Surety damages in the form of losses sustained as a result of the Banks' intentional fraudulent and tortious acts; in not awarding to Surety punitive damages; and in not granting to Surety additional attorneys' fees.

In appeal #58-544, appellant City contends that the chancellor erred in failing to award to City damages in the form of losses resulting from the tortious interference by Banks in the contract between City and Constructors.

These appeals were consolidated by order of this court and will be treated together in this opinion.

The Banks instituted suit to foreclose three chattel mortgages dated July 24 and July 25, 1956, and March 20, 1957, upon which there was due the sums of $13,888.95, $92,690.85 and $151,802.46, respectively, and to impose liability for any deficiency upon appellees Surety and City.

All defendants served with process filed answers denying liability. Appellees Constructors and Individuals counterclaimed, alleging that the note and mortgage dated March 20, 1957, was a renewal of an earlier note and mortgage dated November 14, 1956, in the sum of $442,400.00 given by Constructors to the appellant Banks and that said loan was usurious. In essence, the Counterclaim alleged that the Banks, by withholding a portion of the proceeds of said loan, and charging and receiving interest in excess of that allowed by law, and by the breach of its loan agreement, directly caused the financial collapse of the appellee Constructors; that such actions by appellants caused Constructors to decline a bona fide offer to purchase 40% of its authorized capital stock for $400,000. Damages totalling more than six million dollars were claimed by Constructors and its officers.

The appellee Surety counterclaimed against appellants, adopting the position as to the usurious nature of the loan alleged by the appellee Constructors and further claimed damages against the Banks because of alleged false information furnished Surety by the Banks as to the financial condition of Constructors which resulted in the Surety's

writing additional bonds for Constructors and deterred Surety from taking over certain contracts of Constructors, all of which allegedly resulted in losses to Surety of more than a million dollars. Surety further cross-claimed against appellee Constructors for sums in excess of one million dollars, and attorneys' fees, allegedly due upon some 63 promissory notes secured by chattel mortgages.

The appellee City counterclaimed, adopting the factual allegations of the answers and counterclaims of the other appellees, and, in addition, contended that the tortious interference of the Banks in contractual relationships between Constructors and the City resulted in the City's being required to take over contracts held by Constructors with City and thereby the City sustained a loss in excess of $200,000.

There were other pleadings by parties to this action, but they do not appear relevant to the issues on these appeals and therefore are not being delineated.

The charge of usury in this case evolved out of a transaction which originally took place on November 14, 1956, when Constructors executed and delivered to the Coral Gables First National Bank a chattel mortgage securing a promissory note in the sum of $442,400. This note was payable in 23 monthly installments of $3,000 each and a 24th installment of $373,400, all with interest at 5% per annum. The note also bore interest from maturity at 8%. The security for this loan was a chattel mortgage on all of the equipment of Constructors, together with an assignment of payments due Constructors under two sewer contracts, numbers 7 and 9, with City. At the time of the execution of the $442,400 note and mortgage, Constructors was indebted to the National bank on two prior loans executed in July, 1956, in the original sums of $22,222.32 and $148,305.26, respectively, both loans secured by chattel

mortgages on equipment of Constructors, all of which was subsequently repledged as security for the $442,400 loan of November 14, 1956. There was also outstanding an interim loan of $60,000 due by Constructors to the National bank.

From the proceeds of the $442,400 loan of November 14, 1956, the following disbursements appear to have been made:

1) $60,000 to the Coral Gables First National Bank in repayment of the interim loan by Constructors of Florida.

2) $44,854.44 to the Coral Gables First National Bank as a commitment fee.

3) $44,240 as advanced interest for two years.

4) $90,743.18 was deposited with the Coral Gables First National Bank in Collateral Account #1, held jointly in the names of Constructors of Florida and the Coral Gables First National Bank; withdrawals from which required the signature of an officer of the Bank and the signature of an officer of Constructors of Florida.

5) $202,562.38 to the account of Constructors of Florida.

The commitment fee (item #2 above—$44,854.44) was subsequently transferred by the National bank into Collateral Account #1, making that account total $135,597.62. The funds from Collateral Account #1 were disbursed at intervals to the account of Constructors over a period of time from November 23, 1956, through January 7, 1957, when the entire account was exhausted.

The National bank established a second account known as Collateral Account #2, in which it deposited the proceeds of payments received by it from City under the

assignment of payments given by Constructors to the bank to secure the payment of the November 14, 1956, loan. The following amounts were received by the bank from City and deposited in Collateral Account #2:

November 29, 1956 —	$36,488.11
December 24, 1956 —	42,750.32
January 24, 1957 —	53,247.39
February 26, 1957 —	24,168.04
March 1, 1957 —	37,502.25

making a total of $194,156.11. It was from Collateral Account #2 that the National bank, from time to time, deducted the monthly payments of $3,000 plus 5% interest due under the terms of the note of November 14, 1956. These deductions were as follows:

Date	Principal	Interest
December 17, 1956	$ 3,000.00	$1,843.35
January 14, 1957	3,000.00	1,893.13
February 14, 1957	3,000.00	1,878.96
March 7, 1957	179,540.67	
Totals	$188,540.67	$5,615.44

In the early part of March, 1957, Constructors, being in straitened financial circumstances, requested the National bank to release approximately $50,000 from Collateral Account #2 to the general account of Constructors. The request for the release of these funds was made by letter from Constructors to the National bank and accompanied by a statement which purported to justify the requested funds. After some negotiation with an officer of Constructors, the bank agreed that $50,000 would be advanced to the general account of Constructors out of Collateral Account #2, and in accord with that agreement, an officer of Constructors left with an officer of the Na

tional bank a signed, undated blank check. Instead of making the transfer of the $50,000, as Constructors alleged it was agreed, the check was filled in by some officer or employee of the National bank for the sum of $179,540.67 (which was the total amount remaining in Collateral Account #2), countersigned by an officer of the bank, and applied against the balance due on the $442,400 note. It is contended that this application by the National bank was made without the knowledge or consent of Constructors.

After the National bank had applied the $179,540.67 as aforesaid, a meeting was had among all of the parties which resulted in the execution of a new note, termed a renewal note, dated March 20, 1957, for the sum of $218,275.27, bearing interest at the rate of 15% per annum. At the same time, a usury release was executed by Constructors in favor of the National bank. There was also executed at this time a loan repayment agreement in which it was stipulated that from payments received on sewer contracts Numbers 7 and 9 with the City, the National bank would apply 65% against the indebtedness due the bank by Constructors, and 35% would be deposited into a controlled account to be used by Constructors. The March 20, 1957, note for $218,275.27 was, at the time of the institution of this suit, reduced by payments to $151,802.46.

Coral Gables First National Bank, as indicated by its name, is a national banking institution chartered under the laws of the United States, and is not permitted to lend amounts in excess of 10% of its capital and surplus. In this instance, its limit was $200,000.00. The Pan American Bank of Miami, being a state chartered institution, had no such limitation. It appears, therefore, that when the loan of November 14, 1956 was made, or shortly there-

after, the appellant Pan American was a participant in this loan to the extent of approximately $243,320. The chancellor made a finding regarding the entire participation between the two appellant Banks in the decree from which appeal is taken.[1]

The chancellor found, among other things, that the interest charged and reserved by the Banks on account of the November 14, 1956, loan exceeded 25% per annum; that appellant Banks were joint adventurers and agent and principal each for the other, and imposed penalties against the National Bank under the terms of the Federal Banking Code (12 U.S.C.A., §86) and the State bank under the terms of §687.07, Fla. Stat., F.S.A. The penalties imposed by the chancellor are summarized as follows:

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1. "However, Pan American Bank of Miami, as participant in each of these three (3) loans, was debited by Coral Gables First National Bank with the sums of $19,444.53, $129,767.19, and $243,320.00, or a total of $392,531.72. Actually, therefore, Coral Gables First National Bank was merely a conduit, and agent; the new loan of $442,400.00 did not, according to the books and records of Coral Gables First National Bank, increase the net amount of the indebtedness of Constructors of Florida, Inc.; rather the net amount of indebtedness to Coral Gables First National Bank, after the new loan of $442,400.00, actually decreased from $209,211.62 to $19,242.38, a net decrease of $188,969.24. In other words, immediately prior to the consummation of the alleged $442,400.00 loan on November 14, 1956, Constructors of Florida, Inc., was indebted to Coral Gables First National Bank in the amount of $209,211.62; immediately after the consummation of the allged (sic) $442,400.00 loan, Constructors of Florida, Inc., was indebted to Coral Gables First National Bank only in the small amount of $19,242.38. By loaning $393,531.72 of the money of Pan American Bank of Miami, Coral Gables First National Bank decreased its outstanding loans by $188,969.24."

(a) Liability of Coral Gables First National Bank		
(1) Double the interest collected to March 20, 1957	$ 99,710.88	
(2) Double the interest collected subsequent to March 20, 1957	10,740.70	
	$110,451.58	
Less amount credited to principal on renegotiation	35,584.06	
Total		$74,867.52
(b) Liability of Pan American Bank of Miami		
(1) Principal & interest paid to March 20, 1957	$194,156.11	
(2) Principal paid subsequent to March 20, 1957	66,472.81	
(3) Interest paid subsequent to March 20, 1957	5,370.35	
Total		$265,999.27
(c) Liability of Both Plaintiff Banks For cancellation of principal and interest remaining due		$172,585.29

The chancellor further found that the notes of July 24, 1956, and July 25, 1956, secured by chattel equipment mortgages, were not in default and could be paid in accordance with their respective terms with principal payments held in abeyance from the time of the alleged default to the time of the entry of a complete final decree in this cause; that the liens of City and Surety against the chattels and equipment of Constructors were superior to any claim of the Banks in this proceeding.

The chancellor found that the evidence was not sufficient to prove by a preponderance that Banks were solely responsible or liable for (1) damages suffered by Construc-

tors resulting from the collapse of its business and forfeiture of its contracts; (2) damages suffered by Individuals resulting from the loss of value of the stock of Constructors, loss of profit, or liability of personal guarantees other than those given to Banks; (3) damages suffered by City in connection with the completion of sewer contracts Numbers 7 and 9; and (4) damages suffered by Surety on account of various bonds written or continued for Constructors and Island Construction Company.

The chancellor found that the evidence did show that (1) City did not agree in any way to guarantee any part of the loan made by Banks to Constructors and there was no basis for equitable subrogation in favor of Banks and against City; (2) City is protected in the amounts expended to complete sewer contracts Numbers 7 and 9 by bonds written by Surety; (3) Surety did not agree in any way to guarantee any part of the loans made by Banks to Constructors and there was no basis for any equitable subrogation in favor of Banks and against Surety; (4) Constructors was indebted to Surety in the amount of $1,367,379.19 on account of the various bonds written and continued for Constructors or guaranteed by Constructors; and (5) Constructors should recover against Banks for payment to Surety reasonable attorneys' fees in the amounts of $45,000 and $27,347.50 as part of the consequential damages resulting from the Banks' usurious charges and the improper manner in which the loan accounts were handled by them.

The Banks' main contention is that the transaction was not usurious. They urge that the loan was not usurious at its inception and assuming, but not admitting, that it might have been, that the same was eliminated by a new contract purging the old contract of the vice of usury and making the new a valid and enforceable obligation. These

arguments are without substance, particularly when viewed in the light of the evidence adduced before the chancellor. The chancellor's findings of fact and conclusions as to the usurious character of this transaction are amply supported by the record. To demonstrate that there was usury from its inception would unduly extend an already lengthy opinion. Suffice it to say that when a borrower receives a net of approximately $263,000 from a $442,400 loan, it requires little mathematical calculation to discern that something is amiss.

The Banks' secondary argument that a new contract was entered into that purged the old of its usurious odor is not borne out by the record, including their own pleadings. The Banks, in their complaint seeking foreclosure of the mortgage in question, affirmatively alleged that "on March 20, 1957, there was due and unpaid on said note of $442,400 (plaintiff's Exhibit 3) the principal sum of $218,275.27 as evidenced by a *renewal contract note* of that date in the sum of $218,275.27. * * * Plaintiffs would show unto the Court that *said renewal note* of $218,275.27 *was simply a renewal and extension of the note of November 14, 1956,* in the sum of $442,400 * * *." (Emphasis supplied) The general rule followed in this state is that the usurious character of a contract must be determined as of the date of its inception, and if usurious at that time, no subsequent transactions will purge it. When such contracts are *renewed* by a *new* or *substituted contract, usury follows* and becomes a part of the latter contract, making it vulnerable to the defense of usury in like manner as the original contract. This is not true, however, *when the old contract is abandoned and a new one is entered into free from the vice of the old.* See Shorr v. Skafte, Fla. 1956, 90 So.2d 604, and Wenck v. Insurance Agents Finance Corp., Fla. App. 1958, 99 So.2d 883.

Banks further urge that the chancellor was in error in imposing upon the National bank penalties in excess of that permitted by §86, Title 12, U.S.C.A., and in imposing upon the State bank affirmative penalties in excess of $265,000, when the State bank held only a 5% participation in the renewal note of March 20, 1957; also that a portion of the $265,000 penalty, representing principal paid on the March 20, 1957, note, was wrongfully assessed against the State bank when the evidence shows that such payment was made to the National bank.

Sections 85 and 86, Title 12, U.S.C.A., in substance provide that a National bank may take, receive, reserve and charge interest at the rate allowed by the laws of the state where the bank is located and when a greater is knowingly charged, *the entire interest provided for by the note, etc., shall be forfeited.* Where the interest has been *paid*, the person so paying it may *recover back twice the amount paid.* No other penalties are provided and the Federal courts, as well as a majority of the State courts, have held that no other penalties except those provided in the Act can be invoked against a National bank. See Farmers', etc., Nat. Bank v. Dearing, 91 U.S. 29, 23 L. Ed. 196 (1875) and subsequent cases collected at 12 U.S.C.A. 343.

The Banks argue that some of the penalties assessed against the National bank are in excess of those permitted under the Federal Act, insisting that the only penalty that should be imposed against the National bank is double the amount of interest actually *paid.* This argument is premised on the fact that there may have been usury in the original loan of November 14, 1956, but in no event could such penalties be applied as against the interest collected after March 20, 1957, the date of the renegotiation of the original loan. Concluding as we have that the original loan

was usurious, we reject this contention of the Banks as being without merit.

Another question raised collateral to the Banks' argument that penalties were unlawfully and illegally assessed against the National bank, is that portion of the decree which voided the right of both Banks to collect the balance of $151,802.46, plus interest, the sum allegedly remaining due and unpaid on the renegotiated loan of March 20, 1957. This latter contention of the Banks is bottomed upon the factual premise that the State bank had a participation of only 10% in the renegotiated loan, with the balance of the loan allegedly represented by the funds of the National bank. This contention has partial merit, that is to say, that the Federal Act applicable to National banks as well as the decisions construing the same have almost unanimously concluded that only those penalties provided by the Federal Act could be invoked against a National bank. However, the record in this case discloses, and the chancellor found, that the loan was usurious in its inception, *i. e.*, November 14, 1956. We have concurred in this conclusion; consequently, it is necessary to analyze the status of the participation of the respective banks at the time that the loan was found to be usurious. On November 14, 1956, or shortly thereafter, the National bank participated to the State bank $243,320 of the original loan. However, since the record clearly demonstrates, and the chancellor found, that the borrower received at most approximately $263,000 from the loan of $442,400, it would follow that the State bank's participation in the funds actually made available to the borrower was in excess of 92% of the amounts loaned. Likewise, it follows that the National bank would have furnished slightly in excess of 7% of the original monies loaned. A careful scrutiny of the proceedings that took place at the time of and subsequent to the making of

the original loan indicates that by the device of participation, the State bank attempted to lend its funds through a chartered National bank without subjecting itself to the loss of its principal in the event that the loan was found to be usurious under § 687.07, Fla. Stat., F.S.A. The most that the State bank could lose if this device was unsuccessful, using the National bank as its conduit, would be double the interest actually received by the National bank or a forfeiture of interest that was to accrue. In the final analysis, we conclude that the chancellor was correct in forfeiting interest due and unpaid as it applied to both the State and National banks, but that he was in error when he decreed a forfeiture of the entire amount of principal. Such portion of the remaining unpaid principal on the original loan, hereinabove noted to be approximately 7%, as had not been participated by the National bank to the State bank should have been reserved by the chancellor's decree to the National bank rather than forfeited. In forfeiting that portion of the unpaid balance of the principal belonging to the National bank, the chancellor's decree conflicts with the decisions of the Federal courts as well as those of many state courts of last resort, which hold that only the penalties prescribed by the Federal Act can be invoked against a national bank, namely an affirmative forfeiture of double the amount of interest actually paid or a cancellation or forfeiture of interest that is to accrue and is unpaid.

Another question raised by the Banks was the propriety or correctness of that portion of the decree awarding against Banks, as consequential damages, attorney's fees contracted to be paid by Constructors to Surety under the terms of a general indemnity agreement between said parties. This arose out of the chancellor's award to Surety of sums due it under the general indemnity agreement as claimed in

Surety's counterclaim against Constructors. We think the award of attorneys' fees against the Banks was erroneous, first because attorney's fees as such cannot be awarded in the absence of statute or contract. See Hoffman v. Barlly, Fla. App., 1957, 97 So.2d 355, and cases cited therein. Secondly, the award would appear to be inconsistent with the chancellor's finding that the evidence was insufficient to establish that the Banks were solely responsible for all damages suffered by Constructors resulting from the collapse of its business. In either event, we see no basis for the award of attorneys' fees here against the Banks.

The Banks have urged other points for reversal and they have been duly considered, but found to be without merit.

Upon the appeal of Constructors and individuals (#58-542) they claim error in the failure of the chancellor to award them damages in the form of losses suffered by each as a consequence of the Banks' tortious breach of contract including the act of charging a usurious rate of interest. This may be the rule as applied to torts generally, but these appellants have not cited any authority, and our research has failed to uncover any, that permits an award of consequential damages resulting from a violation of the usury statute in addition to the penalties prescribed by that statute. The Supreme Court of Florida long ago in Matlack Properties v. Citizens and Southern Nat. Bank, 120 Fla. 77, 162 So. 148, held that but for the statute usury was not forbidden, indicating that the subject of usury was one entirely of statutory regulations and prohibition. See Yaffee v. International Company, Fla. 1953, 80 So.2d 919. See also Sodi, Inc. v. Salitan, Fla. 1953, 68 So.2d 882. Further, the Supreme Court of Florida, in Rosenblum v. Hart, Fla. 1957, 95 So.2d 18, held that the penalties provided for under §§ 687.04 and 687.07, Fla.

Stat., F.S.A., are not cumulative but must be applied separately to the degrees of usury defined by the statutes. Nevertheless, from our review of the record, we conclude, as did the able chancellor, that appellants failed to prove, by a preponderance of the evidence, that Banks were solely responsible or liable for all damages suffered by appellants.

The contentions of Surety and City, as evidenced by their appeals, (#58-543 and #58-544, respectively) and assignments of error therein, simply take issue with the chancellor's conclusions based upon the evidence. We have carefully considered the points raised by each appellant but are constrained to conclude that there was competent substantial evidence in the record to support the findings and conclusions of the chancellor.

The record in this case included approximately 2,000 pages of testimony and more than 100 exhibits. Able counsel for the parties on both sides are to be commended for clarity as well as brevity in the presentation of a complicated and voluminous factual case.

In the light of the views expressed, we conclude that the chancellor, in imposing against a National bank as a penalty, the forfeiture of a portion of the unpaid principal of $151,802.46 not participated to the State bank, committed error; that upon a remand of this cause, he should ascertain and determine this amount, and enter an appropriate decree reserving the same to the National bank. We further conclude that the decree, insofar as it awards against Banks attorneys' fees to Constructors, is in error and the same is hereby reversed. In all other respects, the decree appealed is affirmed.

Affirmed in part reversed in part and remanded with directions.

PEARSON and CARROLL, CHAS., JJ., concur.

PORTIONS OF COUNTERCLAIM OF CONSTRUCTORS OF FLORIDA, INC.,

(beginning at Vol. I, R. 87).

8. That at the time of said negotiations it was the understanding of these defendants that defendant, Constructors of Florida, Inc., was to have the full and complete use of said $442,400.00; that it was further the understanding of these defendants that when said checks, made payable by the City of West Palm Beach to said defendant, were received by plaintiff, Coral Gables First National Bank, such plaintiff bank would require said defendant to make such $3,000.00 payments as then might be due on said $442,400.00 note, and that thereafter the proceeds of said checks would be available for said defendant's full and exclusive use.

9. That instead of making available to defendant, Constructors of Florida, Inc., the full proceeds of said $442,400.00 loan, plaintiff, Coral Gables First National Bank, withheld for the use of said defendant substantial portions of said loan and actually applied and/or withheld said proceeds as follows:

(a)	To discount or interest retained by said plaintiff IN ADVANCE		$ 44,240.00
(b)	To payment of $60,000.00 note, defendants' exhibit No. "3",		
	Principal	$60,000.00	
	Less interest rebate	820.02	
	Net payment		59,179.98

(c)	Withheld by said plaintiff from use or control of said defendant, in a so-called "collateral account", under the exclusive control of said plaintiff		
	Nov. 14, 1956	$90,743.18	
	Nov. 16, 1956	44,584.44	
	Total withheld		135,597.62
(d)	Disbursed to said defendant		203,000.00
(e)	Applied to stamps on said note	442.20	
	Less, old stamp credit	60.00	
	Net stamp cost		382.40
	Total of note		$442,400.00

10. That as appears in paragraph 9 of this counterclaim, the actual amount loaned to defendant, Constructors of Florida, Inc., by plaintiffs, was not $442,400.00, but was only $262,562.38, as follows:

Face of Note			$442,400.00
Less:	(a) Discount or interest withheld by plaintiffs (see paragraph 9, item (a) of this counterclaim)	$ 44,240.00	
	(b) Money withheld in control of plaintiffs (see paragraph 9, item (c) of this counterclaim)	135,597.62	
	Total withheld		179,837.62
Actual amount loaned by plaintiffs, Nov. 14, 1956			$262,562.38

11. That portions of said sum of $179,837.62 withheld by plaintiffs from the use or control of defendant, Constructors of Florida, Inc., as aforesaid, were withheld by plaintiffs in a so-called "collateral account"; and that said portions were eventually turned over by plaintiffs to

said defendant; that the total amount eventually so turned over, out of said so-called "collateral account", and the dates of said turning over, were as follows:

November 23, 1956	$ 35,000.00
December 4, 1956	29,000.00
January 7, 1957	71,597.62
Total turned over	$135,597.62

12. That regardless of said turning over, as hereinabove alleged and set forth, the actual amount loaned to defendant, Constructors of Florida, Inc., by said plaintiffs, was never equal to the face amount of said $442,400.00 note (Plaintiffs' Exhibit Number "3"); that as said amounts were so turned over, plaintiffs wrongfully, illegally, *and in violation of their agreement with said defendant*, withheld from said defendant its rightful control and use of other moneys, as more fully set forth and alleged in paragraph 13 of this counterclaim, hereinafter appearing.

13. That upon receipt from the City of West Palm Beach of checks made payable to defendant, Constructors of Florida, Inc., plaintiffs wrongfully and wilfully failed and refused to turn over said checks to said defendant, and further failed and refused to pay over to said defendant the portion of said checks which were due and payable to said defendant, and instead, wilfully and wrongfully cashed said checks and withheld from said defendant not only the amounts due on account of said $442,400.00 loan, but also said remaining portion, in plaintiffs' exclusive control and deprived said defendant of its rightful use thereof; that the dates of collection by plaintiffs of said amounts were as follows:

December 15, 1956	$ 36,488.11
January 7, 1957	42,750.32
January 24, 1957	53,247.39
February 28, 1957	61,670.29
Total collected	$194,156.11

that the only disbursements made by plaintiffs from said collections were certain payments of principal and/or interest on the aforementioned $442,400.00 note, as follows:

	Principal	Interest
December 17, 1956	$ 3,000.00	$1,843.35
January 14, 1957	3,000.00	1,893.13
February 14, 1957	3,000.00	1,878.96
March 7, 1957	179,540.67	
	$188,540.67	$5,615.44

14. That out of said collections from said City of West Palm Beach, said plaintiffs wilfully withheld from said defendant, and deprived said defendant of its rightful use thereof, at least the following amounts:

Dates	Amounts Collected (See paragraph 13)	Amounts Disbursed for principal and interest (See paragraph 13)	Wrongfully Withheld
Dec. 15, 1956	$36,488.11		
Dec. 17, 1956		$ 4,843.35	$ 31,644.76
Jan. 7, 1957	42,750.32		74,395.08
Jan. 14, 1957		4,893.13	69,501.95
Jan. 24, 1957	53,247.39		122,749.34
Feb. 14, 1957		4,878.96	117,870.38
Feb. 28, 1957	61,670.29		179,540.67
Mar. 7, 1957		179,540.67	-0-

15. That notwithstanding plaintiffs' failure and refusal to disburse the total proceeds of said $442,400.00 loan,

and plaintiffs' failure and refusal to pay over to defendant Constructors of Florida, Inc., the amounts properly and legally due to it out of the collections from the City of West Palm Beach, plaintiffs nevertheless wilfully withheld, retained and refused to reduce the total interest and or discount collected by plaintiffs, which said interest and or discount collected and retained by plaintiffs amounted to 56.27% per annum on the amounts of money actually loaned by plaintiffs to said defendant; that the actual and correct amounts loaned by plaintiffs to said defendant and the actual number of days each said amount was outstanding are as follows:

	Date and Explanation	Additions to Loan	Deductions from Loan	Net Loan Outstanding	No. days Outstanding
a.	Nov. 14, 1956: Actual amount loaned, as per paragraph 10 of this counterclaim			$262,562.38	9
b.	Nov. 23, 1956: Turned over from "collateral account", as per paragraph 11 of this counterclaim	$35,000.00		297,562.38	11
c.	Dec. 4, 1956: Turned over from "collateral account", as per paragraph 11 of this counterclaim	29,000.00		326,562.38	11
d.	Dec. 15, 1956: Collected from City of West Palm Beach, as par paragraph 13 of this counterclaim		$36,488.11	290,074.27	2
e.	Dec. 17, 1956: Interest charged	1,843.35		291,917.62	21
f.	Jan. 7, 1957: Turned over from "collateral account", as per paragraph 11 of this counterclaim, and collected from City of West Palm Beach, as per paragraph 13 of this counterclaim	71,591.62	42,750.32	320,764.92	7
g.	Jan. 14, 1957: Interest charge	1,893.13		322,658.05	10
h.	Jan. 24, 1957: Collected from City of West Palm Beach, as per paragraph 13 of this counterclaim		53,247.39	269,410.66	21
i.	Feb. 14, 1957: Interest charge	1,878.96		271,289.62	14
j.	Feb. 28, 1957: Collected from City of West Palm Beach, as per paragraph 13 of this counterclaim		61,670.29	209,619.33	7
k.	Mar. 7, 1957: Balance of amounts wrongfully held by plaintiffs were applied against loan, as per paragraph 14 of this counterclaim. Since they have been applied as collected in this schedule, there is no change in the outstanding total				
1.	Balances/Totals			$209,619.33	113

16. That plaintiff Coral Gables First National Bank, as agent, and plaintiff Pan American Bank of Miami, as principal, actually charged and collected from defendant Constructors of Florida, Inc., as payment for the use of the above-mentioned sums of money, for the number of days above mentioned, the total sum of $49,855.44, as follows:

Discount deducted in advance November 14 1956	$44,240.00
Interest collected, December 17, 1956	1,843.35
Interest collected, January 14, 1957	1,893.13
Interest collected, February 14, 1957	1,878.96
Total discount and interest collected:	$49,855.44

and that said total interest and discount collected is equal to more than 56.27% per annum on the amounts actually loaned and made available to defendant Constructors of Florida, Inc., for the number of days said amounts were outstanding; that the computation of said interest is as follows:

	Net Loan Outstanding, per paragraph 15	No. days Outstanding	Interest @ 56.27% per annum
a.	$262,562.38	9	$ 3,642.99
b.	297,562.38	11	5,046.09
c.	326,562.38	11	5,537.87
d.	290,074.27	2	894.38
e.	291,917.62	21	9,450.69
f.	320,764.92	7	3,461.54
g.	322,658.05	10	4,974.24
h.	269,410.66	21	8,722.04
i.	271,289.62	14	5,855.23
j.	209,619.33	7	2,262.11
	Totals:		$49,847.18

17. That on November 14, 1956, when said plaintiffs granted said loan to defendant Constructors of Florida, Inc., said plaintiffs fully intended to withhold from said defendant any portion of collections from the City of West Palm Beach, as aforesaid, and to hold said collections in a separate account out of which they intended to pay said note; that at said time said plaintiffs knew full well that under the terms of said contracts Nos. 7 and 9 with said city, all work to be performed by said defendant for said city was to be completed within 240 calendar days from August 29, 1956, and that payment was to be received as the work progressed; *that, accordingly, plaintiffs knew full well that they would have collected from said city, within six months from the date of said loan, an amount at least equal to said loan; that the interest reserved by plaintiffs on the face of said loan, when added to the discount withheld by said plaintiffs, amounted to a total of $84,942.42; that said interest amount of $84,942.42 is in excess of 42.66% per annum on the amount of $398,160.00 claimed to have been disbursed by plaintiffs, and in excess of 38.40% per annum on the $442,400.00 face amount of said note.*

18. That, in the alternative, said plaintiffs, having taken an assignment of the proceeds of said Contracts Nos. 7 and 9, are charged with knowledge of the contents of said contracts, and cannot be heard to deny said knowledge.

TESTIMONY OF CLAYTON L. BULLOCK, Certified Public Accountant, Witness for Banks, on Cross Examination, beginning at Tr. 587, Vol. VII, R. 1239.

Q. (By Mr. Maxey) By the terms of the note and knowing what you do about discounts, about what was actually taken at the beginning, what was the total interest contemplated to be collected by the banks?

A. Let me see. I don't think I added this up.

Q. You can do it very simply. It would be this figure (indicating) plus the 10 per cent, would it not?

A. Let me see here. That is right.

Q. What would that total be, if you can tell us, please?

A. $44,240.00 was the amount of the discount so it would be approximately $85,000.00.

Q. Roughly $85,000.00?

A. Yes.

Q. Now, Mr. Bullock, referring to the method by which you computed the 15 per cent, that you show in Schedule 4, I ask you, sir, if the total interest reserved by the note was $85,000.00, and if there had been collected and credited to Collateral Account No. 2 within six months after the original date of the note an amount at least equal to the amount called for to be repaid, approximately what would have been the effective rate of interest based upon the same type of calculation?

A. You lost me, sir.

Q. I think you said you had checked the figure in this Answer and Counterclaim.

A. I compared most of them with the bank's records, yes, sir.

Q. Did you find any errors?

A. I found several minor things that I didn't agree with.

Q. Nothing material?

A. Nothing material, I believe, that I can recall. There are errors of dates that I don't agree with.

Q. I agree with that. There may be some minor errors in dates but no substantial errors or mathematical calculations?

A. I don't speak for the mathematical calculations in there at all. I was referring to the dollar amounts.

Q. Let me ask the question this way: I think you can probably give us an approximation. If the total interest charged was the figure that you just gave us—what was that figure?

A. $85,000.00, approximately.

Q. If it was approximately $85,000.00 and if the note had been completely repaid by credits to the collateral account within six months from the beginning, then approximately what would the effective rate of interest have been?

A. In other words, if it was paid off in six months instead of twenty-four and no rebate were made, why it would be approximately four times our original calculation or some 45 per cent roughly, I would say.

This is hard to do without a calculator and tables, but if a loan was due to be paid off in twenty-four months, installments, and was paid off in six, it would very roughly have the effect of multiplying the rate of interest by four unless you made a rebate.

Q. *Would you say that the figure of 42.66 might be approximately correct?*

A. *That sounds like a close approximation.*

* * *

Tr. 594, Vol. VII, R. 1246:

When you reviewed the figures in the Counterclaim, Constructors of Florida, Jim Lancaster, Richard Reynolds and Earl Goodwin—

A. I can't recall these names, sir, but go ahead and ask your question and if I don't recognize it, I will ask to see it.

MR. MAXEY: Let the record show that I am showing him a copy of the Counterclaim of those mentioned parties, a photostatic copy.

Q. (By Mr. Maxey) Did you review the figures contained in paragraph 9 thereof?

A. This looks familiar. I am sure I have seen it before. I saw something that looked very much like it and did review them, and I think this is the same thing.

MR. GRAY: If you want the original, we will give you the original. It is in the court file.

THE WITNESS: It's not that, Mr. Gray. It has been six months. It is a little hard to remember which document I saw.

MR. GRAY: You remembered it when Mr. Ward questioned you about it. That is the only thing I am talking about.

THE WITNESS: I think this is the same thing, yes, sir.

Q. (By Mr. Maxey) Now, did you verify the mathematics on whatever document it was that you looked at?

A. No, I don't believe so.

Q. You didn't even bother to take care of verifying the subtraction, the addition?

A. We proved this net result subsequently by our own calculation.

Q. In other words, that which shows in paragraph 9 is correct? You verified it by your own calculations?

A. It is mathematically correct.

Q. Now look at paragraph 10.

A. Yes, sir.

Q. Is that mathematically correct?

A. Yes.

Q. Look at the next paragraph, paragraph 11. Are those the same figures and is that correct according to your record with the exception of dates?

MR. GRAY: You will find that on Schedule 1.

THE WITNESS: Thank you.

That is correct.

Q. (By Mr. Maxey) And do the dates very substantially—as a matter of fact, they are exactly the same?

A. The names and dates are identical.

Q. Now, look at paragraph 13 which is the repayments received from West Palm Beach.

MR. GRAY: Mr. Maxey, would you please identify these paragraphs, what he is looking at, so the record will show that?

Q. (By Mr. Maxey) Paragraph 13 of the Counterclaim, Constructors of Florida, Mr. Reynolds, Mr. Lancaster and Mr. Goodwin.

Is the total the same?

A. The dollar amount is the same.

Q. Are the figures approximately the same except that I think one of them contains two of yours?

A. One of them contains two figures, that is correct.

Q. Are the dates approximately the same?

A. They are close. There are some differences, a week or so in some cases.

Q. Isn't every date on here where there is a difference after the date you show on yours?

A. That is true with the exception of the last one where it was one day ahead. All the rest of them, your dates are after mine.

Q. Referring to the last portion of paragraph 13 of that Counterclaim, as to the amounts taken from the collateral account and applied to the face of the note, does that agree with your records?

A. I have not reported on those figures, I don't believe, and I would be speaking from memory.

Q. Well, if you do remember to some extent, tell us.

A. I recall--let me see. Those will agree wit'i this here (indicating).

Q. What part of the audit, Plaintiff's Exhibit 47, are you looking at, Mr. Bullock?

A. I am looking at Schedule 2, the schedule of contemplated payment. I am not sure whether it agrees exactly or not. May I see?

Q. Yes.

A. No, it doesn't.

Q. Does it agree approximately?

A. Yes.

Q. Is the only differences in the interest figure?

A. Yes.

Q. Just by a few dollars?

A. Nominal.

Q. Probably have difference in days?

A. Yes.

Q. Do you recall that an amount of $179,540.00 was applied to the face of the note on March 7, 1957?

A. I do not recall.

This would be a transfer (indicating) from a collateral account of these collections up here above into the note account?

Q. That is correct.

MR. MAXEY: Let the record show that the witness was looking at the latter portion of paragraph 13 of Defendant Constructors of Florida's Counterclaim.

Q. (By Mr. Maxey) Were you finished, sir?

A. I think so. I am not certain of the transaction but I believe that is correct.

Q. Now, Mr. Bullock, when you made this audit, if you had been advised that $179,000.00 odd dollars had been paid on March 7th, would you have questioned the bank as to why they did not make some interest recomputation at that time?

A. Unless the loan was paid off, they might not make the computation until the end of the month. If it hadn't been made by the end of the month, I certainly would have questioned them

Q. Suppose you had merely been making an audit of the bank's records without any specific purpose in mind, just one of your general audits and suppose you had run into a situation with factors like this where $179,540.00 had been paid on the face amount of the note and no adjustment for unearned interest had been made, would you have called it to the attention of one of the officers of the bank?

A. I would.

Q. And would you have suggested that they make some adjustment?

A. Yes.

Q. Mr. Bullock, I show you paragraph 15, a portion thereof, on page 27 of Defendant Constructors of Florida's Counterclaim, that of Mr. Reynolds, Mr. Lancaster and Mr. Goodwin, and I will ask you this question: Does that agree approximately with Schedule 4 of your audit?

A. Yes, sir. There is some difference in dates but certainly they were minor.

Q. Minor differences?

A. Yes.

Q. Mr. Bullock, I show you paragraph 16 of the same Counterclaim and I ask you whether or not the in-

terest alleged by that paragraph to have been collected by the bank agrees with the interest shown to have been collected by the bank on Schedule 1 of your audit?

A. Yes, they are the same amount.

MR. GRAY: Would you mind putting that amount in the record?

Q. (By Mr. Maxey) Is that amount $49,855.44?

A Yes.

Q. Now, Mr. Bullock, do you recall having checked the computations in the latter portion of that paragraph whereby it is alleged that on the number of days outstanding and on that $49,855.44 the effective rate of interest would have been 56.27 per cent?

A. In my opinion, the calculation was mathematically unsound and I didn't even bother to check it.

Q. Would you check it now?

A. No, sir, I will have to have a calculator and time to work on it.

Q. Would you do that and bring us the results of your check?

MR MAXEY: Is that all right with you, Mr. Ward? I will pay for his time.

MR. GRAY: I won't pay for his time. He is on cross-examination and when a witness says he considers that that is mathematically unsound for no purpose at all, I want to have him calculate it and show this court where it is mathematically unsound.

MR. WARD: If Your Honor please, they are trying to bring out nothing that I brought out on direct. They are trying to prove their Counterclaim, and I think if they want this witness to compute their Counterclaim figures they ought to do it themselves.

THE COURT: I will overrule the objection.

I would like the witness to explain why it is mathematically unsound.

THE WITNESS: Because of the fact that this is an attempt to compute actual yield on the loan and no credit was made for rebate.

Q. (By Mr. Maxey) Let me ask you this question, Mr. Bullock: As of March 7, 1957, before any rebate was made and assuming that no rebate was ever made, would this be mathematically correct, this latter part?

A. It is feasible, yes, sir, in that case.

Q. Can you tell by inspection whether or not it is approximately correct?

A. Yes, it would be approximately correct.

Q. You would say it was not substantially wrong.

A. No.

Q. Within what percentage of error?

A. Oh, within 10 per cent of error, perhaps.

Q. Within 10 per cent?

A. Not 10 per cent yield—in other words, reasonably close.

Q. In other words, you would say that from inspection the interest rate would have been in excess of 50 per cent?

A. It would appear so from those facts.

TESTIMONY OF ESTEN A. ULMER, Certified Public Accountant, Witness for Constructors, Individuals, City and Surety, beginning at Tr. 760, Vol. VIII, R. 1414.

Q. Mr. Ulmer, for some hour and a half or two hours you have had a chance to look over Plaintiff's Exhibit 6, Plaintiff's Exhibit 4, Plaintiff bank's Exhibit 2 and Defendant's Exhibits I and J and the audit of Pentland, Purvis and Keller, designated as Plaintiff's Exhibit 47, have you not, sir?

A. Yes, sir.

Q. Now, Mr. Ulmer, sometime last week and prior to this trial, I delivered to you, did I not a photostatic copy of the Counterclaim filed on behalf of Constructors of Florida, Inc., and a copy of the audit of Pentland and Purvis, which is identical with Plaintiff's Exhibit 47, is that correct?

A. Yes, sir.

Q. And at that time I asked you to make a study of both, is that correct?

A. Yes, sir.

Q. Now, suppose, Mr. Ulmer, that a loan of $442,400.00 was made on November 14, 1956, and that said loan was evidenced by a promissory note payable in 23 monthly installments at the rate of $3,000.00 per month, with a balloon payment or a final payment of $373.400.00, all with interest at the rate of five percent per annum, and further suppose that the lender paid over to the

borrower as of the date of the loan only $262,562.38, and that the lender withheld the sum of $44,240.00 as a commitment fee or as interest paid in advance, and further withheld from the borrower in a controlled account the sum of $135,597.62, and further suppose that $135,597.62, which is withheld, to which I have just made reference, was turned over to the borrower at later dates as follows:

On November 23, 1956, the sum of $35,000.00; on December 4, 1956, the sum of $29,000.00; on January 7, 1957, the sum of $71,597.62 or a total of the controlled account above referred to in the amount of $135,597.62;

And further suppose, if you will, that out of the certain contracts taken by the lender as collateral for the loan the following monies were collected and held in another controlled account, which we will designate collateral account No. 2: that on December 15, 1956, there was paid from certain contracts assigned as collateral for the $442,400.00 loan the sum of $36,488.11, and on January 7, 1957, there was paid in from the collateral contracts to the bank in collateral account No. 2 the sum of $42,750.32, and that on January 24, 1957, there was paid in from said collateral contract to collateral account No. 2 the sum of $53,247.39, and that on February 28, 1957, there was paid in to the said controlled collateral account No. 2 the sum of $61,670.29, making a total collected as of February 28, 1957, from the assigned contracts, and placed in the said controlled collateral account No. 2, a total sum of $194,156.11, and further suppose, if you will, please, that the total discount or commitment fees collected or retained by the lender totaled $49,855.45 as follows:

On November 14, 1956, the date of the original loan, there was deducted from the face value of the said $442,400.00 loan the sum of $44,240.00; that on December 17, 1956, there was deducted from monies coming in from collateral account No. 2 as interest $1,843.35; that on January 14, 1957, there was deducted from collateral account No. 2 for monies coming in $1,893.13; that as of February 14, 1957, there was deducted from monies coming in from the contracts the sum of $1,878.96, making a total as hereinabove stated as interest or prepaid interest or commitment fees on the said loan of the amount of $49,855.44.

Now, Mr. Ulmer, taking into consideration all of the assumptions we have just made, what would be the effective simple interest rate per annum on the amounts of money actually loaned and made available to the borrower for the number of days said amounts were outstanding from November 14, 1956, to and including March 7, 1957, based on a 365 day year; do you know that answer?

MR. WARD: If your Honor please, I wish to make this objection to the question as stated: No. 1, it presupposes and assumes a payment from the bank to the collateral account No. 1, a segregation of those funds would not be a payment to the corporation. No. 2, that it presupposes that there was a contract which does not exist in this record, that the monies received from the City of West Palm Beach into the collateral account No. 2 were subject to use by the bank and subject to offset. Those are the two essential features in which the record in this case so far is contradictory to the assumed question.

THE COURT: Overruled.

Q. (By Mr. Gray) Will you answer the question, Mr. Ulmer?

A. 56.27 per cent.

Q. (By Mr. Gray) In other words, based on the facts that I have related to you in the hypothetical question, the interest on the actual days used would be 56 and what?

A. Twenty-seven hundredths per cent.

(Short recess taken.)

Q. (By Mr. Gray) To get the record straight again, I believe that you answered my first part of my hypothetical question, 56 and what per cent interest?

A. 56.27 per cent.

Q. Now, that figure is interest on the basis of 365 days in a year; is that correct?

A. Yes, sir.

Q. If you figure that interest on the rate of 360 days in a year, what would be the per cent of interest charged?

A. 55.5 per cent.

Q. Now, Mr. Ulmer, based upon the same assumptions that we have just made, and in addition on the further supposition that the total interest reserved by the lender on the face of the note when added to the discount or commitment fee withheld by the lender at the inception of the loan amounted to the total of $84,942.42, and further suppose that within six months the lender collected out of the contracts taken by the lender as collateral for the loaned amounts sufficient to make each and every principal and interest payment called for by the note, and further suppose that the lender retained said collections in a separate account, out of which the

lender paid to itself the principal and interest payments becoming due, then, Mr. Ulmer, what would be the effective simple interest rate per annum based on the $442,400.00 face amount of the note?

MR. WARD: Your Honor, is there any use for me to renew my objection?

THE COURT: We will let your objection stand to all these questions.

Q. (By Mr. Gray) Will you answer it, please, sir?

A. 38.4 per cent.

Q. What would be the effective simple interest rate per annum based on the amount of the loan of $442,400.00, less a discount or commitment fee reserved by the lender at the inception of the loan, $44,240.00, that is to say, based on the net amount of the loan, namely, $398,160.00?

A. 42.66 per cent.

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DEFENDANTS' EXHIBIT H.

Date 4-3-57

Enclosed find the cancelled checks listed herewith, which we apparently failed to include in your last statement.

Date of Check	Amt.
3-8	179,540.67

Albert E. Metzger
Vice President & Cashier

CONSTRUCTORS OF FLORIDA, INC.
167 ALMERIA
CORAL GABLES, FLA.

H

DEFENDANTS EX
Filed 5/2 A.D. 1958
Case No. 20566/3
E. B. LEATHERMAN
Clerk Circuit Court

A-7

A53

MAR 7 1957

CORAL GABLES, FLORIDA March 6 1957 No.

THE CORAL GABLES FIRST NATIONAL BANK

CORAL GABLES FIRST NATIONAL BANK $179,540.67

One Hundred Seventy Nine Thousand Five Hundred Forty DOLLARS and Sixty Seven Cents

Constructors of Florida
FOR Collateral Account No. 2

Constructors of Florida
Earl L. Anderson

PAY TO THE ORDER OF
ANY BANK OR BANKER

MAR - 7 '57 70900

THE CORAL GABLES FIRST NATIONAL BANK
CORAL GABLES

63-478 63-477

PLAINTIFFS' EXHIBIT 6.

Compute interest at rate
of 5% monthly

$442,400.00 November 14, 1956

Payable in twenty three (23) monthly installments of $3,000.00 Each Plus Interest and one of $373,400.00 Plus interest at the rate of 5% per annum beginning one month from date FOR VALUE RECEIVED, the undersigned promise(s) to pay to THE CORAL GABLES FIRST NATIONAL BANK (hereinafter called the Bank), or order, at its Office at Coral Gables, Florida, FOUR HUNDRED FORTY TWO THOUSAND FOUR HUNDRED AND NO/-100 DOLLARS, with interest at the rate of 8 per cent per annum after maturity; having deposited with the Bank as security for the payment of this note and of all other liabilities of the undersigned as hereinafter defined, the following property, viz:

Chattel Mortgage on equipment

Pledge of all Monies due from Sanitary Sewer Contract No. 7 and 9, between the City of West Palm Beach, Florida and Constructors of Florida, Inc.

The term "Liabilities" as herein used shall include any and all loans, advances and credits by the Bank, both in its own behalf and in behalf of others, to the undersigned, any and all indebtedness, notes, bonds, obligations and liabilities of any kind of the undersigned whether to the Bank and or to any other or others in whose behalf the Bank shall have acted in creating the same, now or hereafter existing, or heretofore or hereafter acquired from

another by the Bank and or by anyone for whom it has acted or shall act in acquiring the same, whether absolute or contingent, secured or unsecured, due or not due, direct or indirect, arising by operation of law, contractual or tortious, liquidated or unliquidated at law, in equity, in admiralty or otherwise, and whether heretofore or hereafter incurred or given by the undersigned as security or otherwise. The term "Security" as herein used shall include any deposit account maintained by the undersigned with the Bank or any other claim of the undersigned against the Bank, all money, negotiable instruments, commercial paper, bonds, stocks, credits, choses in action, claims, demands, or any interest in any thereof, and any other property, rights and interests of the undersigned, or any evidence thereof, which have been or at any time shall be delivered to the Bank or any of its agents, associates or correspondents, for any purpose, whether or not accepted for the purpose or purposes for which they are delivered; and all such money, negotiable instruments, commercial paper, bonds, stocks, credits, choses in action, claims, demands, or any interest in any thereof, and any other property, rights and interests, or any evidence thereof, as have or shall come into the possession, control or custody of the Bank or of any of its agents, associates or correspondents, or others acting in its behalf, for account, subject to the order, or otherwise for the benefit or under the control of the undersigned. The Bank shall be deemed to have possession, control or custody of any security actually in transit to or set apart for it or any of its agents, associates, correspondents or others acting in its behalf.

As security for the payment of the foregoing note and or of any and all such Liabilities, the undersigned hereby pledge(s) to the Bank all such Security capable of pledge and bargains(s), sell(s), assign(s) and transfer(s)

to the Bank, and or gives(s) it a general lien upon, all right, title and interest of the undersigned in and to any thereof incapable of pledge or inadequately pledged, such pledge and or sale, assignment, transfer and or lien being made or created for the protection and security of the Bank and or any other or others (but pro rata if held for the benefit of more than one) for whom it has acted or shall act as agent in connection with the creation of any such liability, and in trust for the benefit, and to the extent of the interest, of any such other or others therein.

The Bank, at its discretion, may, whether or not any of such Liabilities be due, in its name and or in the name of anyone for whom it has acted as agent in connection with the creation of any such liability, or in the name of the undersigned, demand, sue for, collect and or, receive any money or property at any time due, payable or receivable on acount of or in exchange for, or make any compromise or settlement deemed desirable with respect to, any Security, but shall be under no obligation so to do. If the Security shall consist of or include negotiable instruments and or other choses in action and or promises or agreements of any character to pay money, they may be sold in the manner hereinafter provided with respect to the sale of any Security; or the Bank, and or anyone in whose behalf it has acted or shall act in obtaining such security, may extend the time of payment of any such obligation, arrange for payment of any thereof in installments, or otherwise modify the terms thereof as to any other party liable thereon, without thereby incurring responsibility to, or discharging or otherwise affecting any liability of, the undersigned thereon or in connection therewith. The Bank, and or anyone for whom it has acted or shall act as agent as herein provided, upon default (in payment, furnishing security or otherwise) hereunder or in connection with

any such Liabilities (whether such default be that of the undersigned or of any other party obligated thereon in whole or in part), may sell, in one or more sales or parcels, all or any of the Security, at public sale, without demand of performance or notice of intention to sell and the Bank, and or anyone in whose behalf it has acted or shall act as hereinbefore provided, may be the purchaser of any or all property, rights and or interests so sold and thereafter hold the same absolutely free from any claim or right of whatsoever kind, including any equity of redemption, of the undersigned, any such demand, notice or right and equity being hereby expressly waived and released. The undersigned will bear and pay all expenses (including expense for legal services of every kind) of, or incidental to, the enforcement of any of the provisions hereof or of any Liability or Liabilities, or of any actual or attempted sale, or of any exchange, enforcement, collection, compromise or settlement of any Security and or of receipt of the proceeds thereof, and will repay to the Bank, and or to anyone for whom it has acted or shall act as agent as herein provided, any such expense incurred; and such expense shall be deemed an indebtedness within the terms of this agreement. The Bank, and or anyone for whom it has so acted or shall so act as agent, at any time, at its and or his and or their option, may apply all or any of the net cash receipts from or on account of any Security to the payment in whole or in part of any or all of the Liabilities, applying or distributing the same as it and or he and or they shall elect, whether or not the item or items on which such payment is applied be due, making proper rebate of interest or discount in case of payment on any item not due. Notwithstanding that the Bank, whether in its own behalf and or in behalf of another and or of others, may continue to hold Security and regardless of the value thereof, the under-

signed shall be and remain liable for the payment in full, principal and interest, of any balance of said Liabilities and expenses, at any time unpaid.

If at any time the Security for the foregoing note and - or for any of such Liabilities shall be unsatisfactory to the Bank, or any of its officers, and the undersigned shall not on demand furnish such further security or make such payment on account as shall be satisfactory to the Bank, or if any sum payable upon any of said Liabilities be not paid when due, or if the undersigned or any maker, obligor, endorser, guarantor, surety, issuer of, or other person liable upon or for any of said Liabilities, or any maker, obligor, endorser, guarantor, surety, issuer of, or other person liable upon or for any Security, shall die or shall become insolvent (however such insolvency may be evidenced), or make a general assignment for the benefit of creditors, or, if the undersigned or any copartnership of which he is a member, shall suspend the transaction of his or its usual business, or if a petition in bankruptcy shall be filed by or against, or if a receiver shall be appointed of, or a writ or order of attachment or garnishment shall be issued or made against any of the property or assets, or any part thereof, of the undersigned, or of any such copartnership, or of any such maker, obligor, endorser, guarantor, surety, issuer, or other person, thereupon, unless the Bank, and or anyone in whose behalf it has acted or shall act as hereinbefore provided, shall otherwise elect, any and all of said Liabilities shall become and be due and payable forthwith, without presentation, demand, protest, notice of protest or other notice of dishonor of any kind, all of which are hereby expressly waived.

The Bank may, without any notice to the undersigned, repledge all or any part of the Security separate from any of the Liabilities for which it is pledged by the undersigned.

The Bank, and or anyone in whose behalf it has acted or shall act as agent in connection with the creation of the same, may assign or otherwise transfer any or all or any part of any of said Liabilities, and may transfer and or deliver to any transferee any or all of the Security for the liability, or part thereof, assigned or transferred; and shall be thereafter fully discharged from all claim and responsibility with respect to any and all Security so transferred and or delivered and the transferee be vested with all the powers and rights of the transferor and or transferors hereunder with respect to such Security, but the Bank, and or anyone in whose behalf it has so acted or shall so act, shall retain all rights and powers hereby given with respect to any Security not so transferred. The Bank may also transfer the foregoing note and, in the event of such transfer, the transferee shall have the same rights and remedies hereunder as if originally named herein in place of the Bank.

No delay on the part of the Bank and or of anyone in whose behalf it has acted or shall act as herein provided, or of any transferee, in exercising any power or right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any power or right hereunder preclude other or further exercise thereof or the exercise of any other power or right. The rights and remedies herein expressly specified are cumulative and not exclusive of any rights or remedies which the Bank, and or anyone in whose behalf it has acted or shall act as herein provided, or its and or his and or their transferees, may or would otherwise have.

The undersigned, if more than one, shall be jointly and severally liable hereunder and upon the foregoing note and all provisions hereof regarding Liabilities or Security of the undersigned shall apply to any liability or any security of any or all of them. These presents are to be

binding upon the heirs, executors, administrators, assigns or successors of the undersigned.

CONSTRUCTORS OF FLORIDA, INC
By: s/ Earl L. Goodwin (SEAL)
Secretary-Treas.
167 Almeria Avenue (SEAL)
Coral Gables, Florida

State of Florida)
) SS:
County of Dade)

Subscribed to before me this day of 19
53479

Loan 11-3M-3156

Notary Public

(Stamp on Original) Paid by Renewal.

IN CONSIDERATION of One Dollar (1.00), receipt whereof is hereby acknowledged and of the credit given or discount loan or extension of time made by or upon within note, which the undersigned requested the undersigned (if more than one jointly and severally), hereby unconditionally guarantee to THE CORAL GABLES FIRST NATIONAL BANK, Coral Gables, Florida, its successors and assigns, and every subsequent holder of said note, irrespective of the genuineness, validity, regularity or enforcibility thereof, or of the obligation evidenced thereby, or of any collateral therefor, or of the existence or extent of any such collateral, and irrespective of any other circumstance, that all sums stated therein to be payable thereunder shall be promptly paid in full when due, in ac-

cordance with the provisions thereof, at maturity, by acceleration or otherwise, and, in case of extension of time of payment in whole or in part, all said sums shall be promptly paid when due according to such extension or extensions at maturity, by acceleration or otherwise; and hereby consent that from time to time, without notice to the undersigned, payment of any sums payable under said note, or of any of the collateral therefor, may be extended in whole or in part or any of said collateral be exchanged, surrendered or otherwise dealt with as the holder of the within note may determine, and that any of the acts mentioned in said note may be done; and hereby waive presentment, demand of payment from the maker, protest and notice of non-payment or protest, or notice of any exchange, sale or other handling of collateral.

(Pasted on original) Florida Stamps

PORTION OF PLAINTIFFS' EXHIBIT 47 — AUDIT OF PENTLAND, PURVIS, KELLER & COMPANY, SCHEDULE 1

• • • •

SUMMARY OF INTEREST CHARGED

Face Amount of Note	$ 442,400.00
Total Disbursements	398,160.00
Discount Deducted	$ 44,240.00
Monthly Interest Charges at 5% per annum	5,615.44
Total	$ 49,855.44

• • • •

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT.

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI, Appellants, vs. CONSTRUCTORS OF FLORIDA, INC., etc., et al., Appellees.	Case No. 58-526 Case No. 61-230

CERTIFICATE OF THE CLERK

I, WILLIAM P. CARTER, Clerk of the District Court of Appeal of Florida, Third District, DO HEREBY CERTIFY that, as Clerk of such Court, I was heretofore in possession of the complete Transcript of Record in Case No. 58-526, including all of the testimony and all of the exhibits which were introduced and offered in evidence in Case No. 58-526. I FURTHER CERTIFY that, as the Clerk of such Court, I am now in possession of the complete transcript of record in Case No. 61-230; and that an examination of my files in said two (2) cases discloses:

1. That both of said appeal cases grew out of the same trial court proceedings, namely, Case No. 205613-E, in the Eleventh Judicial Circuit of Florida, in and for

Dade County, Florida;

2. That there were twenty-four (24) witnesses who testified in the cause in the Circuit Court, exclusive of depositions;

3. That the Transcript of Record in Case No. 58-526 consisted of some 1925 pages;

4. That the Appellant-Banks introduced and there were received in evidence in the Circuit Court some fifty (50) exhibits; that Appellees introduced and there were received in evidence in the Circuit Court some forty-seven (47) exhibits; that the Appellant-Banks identified four (4) exhibits which were not received in evidence in the Circuit Court; and that the Appellees identified two (2) exhibits which were not received in evidence in the Circuit Court;

5. That the Opinion in Case No. 58-526 was rendered by this Court on March 22, 1960 (reported in 119 So.2d 741; rehearing denied May 4, 1960); and that said Opinion was based upon the entire Transcript of Record as hereinabove described in Paragraphs 1-4 hereof;

6. That pursuant to the request of The Coral Gables First National Bank and Pan American Bank of Miami,

Appellants in this Court and Petitioners in the Supreme Court of the United States, I certified certain fragmentary portions of the testimony of four (4) of the witnesses and certain other portions of the Transcript of Record and some of the exhibits in Case No. 58-526, for the purpose of filing same in the Supreme Court of the United States, in connection with its Case No. 559, October Term, 1960;

7. That on March 22, 1961, I returned to the Clerk of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, the complete record in Case No. 58-526; and that the same has not been returned to my custody, nor certified to this Court in connection with Case No. 61-230;

8. That pursuant to the request of The Coral Gables First National Bank and Pan American Bank of Miami, Appellants in this Court, and Petitioners in the Supreme Court of the United States, on December 13, 1961, I certified certain orders, pleadings, opinions, and decrees in Case No. 61-230, for the purpose of filing same in the Supreme Court of the United States;

9. I have not certified the entire Transcript of Record including the testimony of all of the witnesses and all of the exhibits in these cases for the purpose

of being transmitted to the Supreme Court of the United States.

WITNESS my hand and official Seal of this Court, at Miami, Dade County, Florida, on this 6th day of February, A. D., 1962.

/s/ William P. Carter,
William P. Carter,

(Seal)

Clerk of the District Court of Appeal of Florida, Third District.

12 U.S.C., §85:

§85. RATE OF INTEREST ON LOANS, DISCOUNTS AND PURCHASES

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency,

province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. R.S. § 5197; June 16, 1933, c. 89, § 25, 48 Stat. 191; Aug. 23, 1935, c. 614, § 314, 49 Stat. 711.

12 U.S.C., §86:

§86. USURIOUS INTEREST; PENALTY FOR TAKING; LIMITATIONS

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *PROVIDED*, That such action is commenced within two years from the time the usurious transaction occurred. R.S. § 5198..

OPINION OF COMPTROLLER OF CURRENCY NUMBER 9530:

There is no legal prohibition against a national bank making a loan in periodic installments instead of in a single lump sum, although the latter is the usual practice. Likewise, it is not illegal to accomplish the same end by placing the entire amount of a loan in a special account out of which the borrower may make limited periodic withdrawals.

However, under the latter arrangement the bank must be careful that the total charges imposed upon the borrower (whether such charges are described as "interest", "service charges", or otherwise) do not exceed the legal rate of interest. R.S. 5197 (12 U.S.C. 84) limits the interest charges of national banks to the rate "allowed by the laws of the State . . . where the bank is located . . . except that where by the laws of any State a different rate is limited for banks organized under State laws", national banks located in that State may also charge such higher rate.

The courts have held that *if a borrower is required to leave part of the proceeds of a loan on deposit with the lender, the transaction is usurious if the interest paid amounts to more than the legal interest on the sum actually available* for use by the borrower.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1960

WEDNESDAY, SEPTEMBER 28, 1960

AMERICAN SURETY COMPANY OF NEW YORK, a New York corporation,
Appellant,

vs.

THE CORAL GABLES FIRST NATIONAL BANK, a banking corporation organized under the laws of the United States, and PAN AMERICAN BANK OF MIAMI, a banking corporation organized under the laws of the State of Florida, Appellees.

This cause having come on for consideration and the Court being of the opinion that it has no jurisdiction to consider and act upon the appeal entered in this cause, it is ordered that the appeal which was entered in this cause from the District Court of Appeal of Florida, Third District, on June 29, 1960, be and the same is hereby dismissed sua sponte.

A True Copy

TEST:

Clerk Supreme Court.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1960

WEDNESDAY, SEPTEMBER 28, 1960

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation; JOHN NICHOLAS, its Trustee in Proceedings for Reorganization Pursuant to Chapter X of the Act of Congress Relating to Bankruptcy; RICHARD R. REYNOLDS, JIM M. LANCASTER, JR. and EARL L. GOODWIN,

Appellants,

vs.

THE CORAL GABLES FIRST NATIONAL BANK, a banking corporation organized under the laws of the United States, and PAN AMERICAN BANK OF MIAMI, a banking corporation organized under the laws of the State of Florida, Appellees.

This cause having come on for consideration and the Court being of the opinion that it has no jurisdiction to consider and act upon the appeal entered in this cause, it is ordered that the appeal which was entered in this cause from the District Court of Appeal of Florida, Third District, on June 29, 1960, be and the same is hereby dismissed sua sponte.

A True Copy

TEST

Clerk Supreme Court.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT.

JANUARY TERM, A.D., 1961.

THURSDAY, MAY 25, 1961.

CASE NO. 61-230.

THE CORAL GABLES FIRST NATIONAL BANK and PAN AMERICAN BANK OF MIAMI,
Appellants,

vs.

CONSTRUCTORS OF FLORIDA, INC., etc., et al.,
Appellees.

This cause having come on before the court on appellees' motion to quash interlocutory appeal and the court having considered same, it is ordered that said motion is granted and this interlocutory appeal from the Circuit Court of Dade County, Florida (Chancery No. 205613) be and the same is hereby quashed.

It is further ordered that appellees' motion to assess damages is hereby denied.

A True Copy

ATTEST:

William P. Carter
Clerk District Court of Appeal,
Third District.

(Seal)

(The aforegoing is the Order referred to in the Brief in Opposition as the "*1961 Florida District Court Order*")

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1961

MONDAY, JULY 24, 1961

61,230.

THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America, etc., et al.,
Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation, et al.,
Respondents.

(Filed 1961, September 27.)

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date May 26, 1961, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

TEST:

/s/ Guyte P. McCord
Clerk Supreme Court.

By:
Deputy Clerk.

(Seal)

A True Copy

ATTEST:

/s/ William P. Carter
Clerk District Court of Appeal, Third District.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1961

TUESDAY, SEPTEMBER 26, A.D. 1961

61,230.

THE CORAL GABLES FIRST NATIONAL BANK, a banking institution organized under the laws of the United States of America, etc., et al.,
Petitioners,

vs.

CONSTRUCTORS OF FLORIDA, INC., a Florida corporation, et al.,
Respondents.

(Filed 1961, September 27.)

On consideration of the Petition for Rehearing filed by Attorneys for Petitioners,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A True Copy.

TEST:

/s/ Guyte P. McCord
Clerk Supreme Court.

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, ORDER OF JULY 24, 1961, DENYING PETITION FOR WRIT OF CERTIORARI IN THE ABOVE CAUSE.)

A True Copy,

ATTEST:

/s/ William P. Carter
Clerk District Court of Appeal,
Third District.

(Seal)